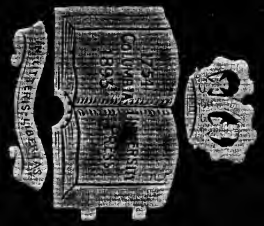

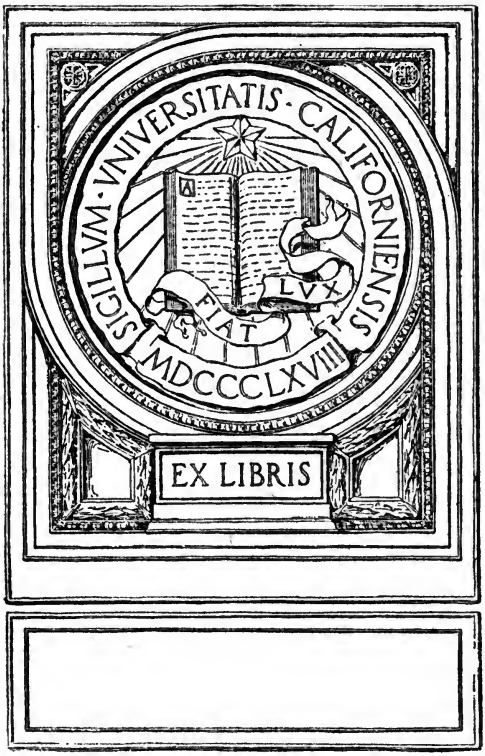
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Columbia University Lectures

AMERICAN CITY PROGRESS AND THE LAW

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COLUMBIA UNIVERSITY LECTURES

AMERICAN CITY PROGRESS AND THE LAW

BY

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PREFACE

This volume contains the substance of a series of lectures given upon the Hewitt Foundation at Cooper Union in the city of New York during the months of February and March, 1917. It deals with certain of the more important rules of law that are involved in some of the forward-looking movements in American cities. Under our constitutional system nearly every so-called reform movement must reckon with the law; and municipal reforms are especially liable to be called to this reckoning. For of the several important types of unit in our complicated system of government, the city operates under the largest number of restrictions imposed by written fundamental laws. As a subordinate agency of the state it is subject to most of those far-reaching restrictions imposed upon the states by the fundamental law of the nation. It is naturally controlled also by many limitations embodied in the fundamental law of the particular state of which it is a part. And it is further subject to one and all of the usually numerous restrictions imposed by its own fundamental law—its charter.

It cannot be too greatly emphasized that the scope of this volume is limited to an examination of legal principles. In what respects does the law as it now stands facilitate or obstruct the city in its endeavor to apply this or that new policy to the solution of an existing problem? With the policy itself—whether it

be, for example, of home rule, or of billboard regulation, or of zoning, or of municipal ownership of utilities—we are not primarily concerned. Within the limits of this volume it would be manifestly impossible, even if it were desirable, to discuss in adequate fashion the pros and cons of the numerous controversial questions that are suggested by the topics under review. No considerable reference will be made to the theoretical, the fiscal, the political, the economic, the social aspects of the policies under discussion except in so far as the views of the courts have been predicated upon one or more of these aspects. The law is the subject of our attention.

HOWARD LEE MCBAIN

WARSAW, NEW YORK
August, 1917

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CHAPTER I

HOME RULE BY LEGISLATIVE GRANT

Congestion of population is the essential premise of city existence. Out of this premise arise economic and social problems that are manifestly localized. The city, in consequence, is a more or less natural unit of government. It is a far more logical unit than is a state of the American Union; it is even more logical than are many of the national units of the world.

In consideration of the obvious dependence of urban life upon rural activities, the city is of course not a logical unit for a completely independent government. It may be impossible to define with precision which of the problems of government within a city are inherently local in character. It seems, nevertheless, beyond dispute that there are problems that are peculiarly local. This is recognized to an extent in the naked fact of incorporation, in the mere investing of the city with legal personality. Probably no one could be found who would be hardy enough to urge that cities as corporate entities should be ruthlessly cast among our institutional discards—that their entire functions should be carried on by direct action of the state. Yet in some respects we have drifted perilously near to this, as a hasty glance at the evolution of relations between the city and the state will disclose.

The chief argument for municipal home rule

In the early days of our history municipal charters were brief and simple instruments. In somewhat general terms these charters conferred powers of local self-government. A considerable discretion both in the interpretation of these powers and in the actual working out of the scheme of city government was vested in a few prescribed authorities. It seems unnecessary to recount the steps by which all this was changed. The rule of law became firmly established that, in the absence of some constitutional provision in point, the will of the state legislature was supreme; cities enjoyed no "rights" that had to be respected.[1] From an attitude of self-imposed deference toward cities, legislatures gradually crossed over into an attitude of distrust, indifference, spoliation, and sometimes even of open hostility. Some—perhaps much—of the distrust was deserved; although it must be remarked that the "guardianship" of the legislature usually left much to be desired. For the indifference there was perhaps some justification. For the spoliation and hostility there was manifestly no excuse.

This must be said also—that with the expansion of municipal functions and the consequent swelling of municipal expenditures, a very natural change came about in the concept of what a municipal charter should contain. A charter is the fundamental law of the city; and while there is probably no one who can define the term "fundamental" as used in this connection to the satisfaction of any considerable number of persons

[1] McBain, *The Doctrine of an Inherent Right of Local Self-Government*, in 16 *Columbia Law Review*, 190 and 299.

other than himself, there is no doubt that our notion of the proper scope of a municipal charter, however general it may be, has widened. Wherever the charter-making power may be lodged, whether in the state legislature or in the local community, we shall probably never return to the brief municipal charters of earlier times.

However that may be, it is simply a fact that in the course of time the legislature has, by the enactment of elaborate and ever more elaborate charters and charter amendments, thrust its hands into the very minutiæ of city government. It has occupied field after field that was formerly either wholly unoccupied or left to local action. It has regulated detail after detail that never should have been made the subject of charter provision. The fundamental law of New York State contains about 25,000 words. The fundamental law of New York City, not including unrepealed provisions of early charters and many special laws applicable to the city, contains over 400,000 words. This is the prime fact upon which the argument for home rule for cities is founded. Bound in the innumerable impediments of complicated charter laws, cities have too little opportunity for constructive self-development. They must eternally appeal to an extraneous superior, the state legislature; and they must often be denied their requests. They must eternally fight against "interference" in their affairs, which is none the less reprehensible because it is legal.

There are, of course, those who urge that the city is in need of constant tutelage. This amounts to the assertion that the city is incapable of self-government.

It may be freely admitted that all of our units of government show occasional, if not indeed frequent, appearances of political incapacity. It may be admitted also that in many instances cities have been protected against themselves by state legislature. But the homely fact is that while in the fluxes of our politics state governments are sometimes superior to city governments in standards of civic righteousness and ability, they are also sometimes grossly inferior in these standards. In the face of such fluxes tutelage may be needed today and protection against tutelage, tomorrow. By and large, the capacity of the city for self government is doubtless measured directly by our capacity as a people for creating and operating democratic institutions.

Home rule by constitutional grant

Whatever general arguments may be advanced in opposition to the plan of extending larger powers to cities, home rule is arriving fast. One-fourth of the states of the Union have by constitutional provision already conferred upon some or all of their cities the power to frame and adopt their own charters. [2] In a number of other states there is active agitation for a similar constitutional grant. It is more important to face this fact than to discuss the pros and cons of home rule as a policy.

In most of the twelve states that have adopted this system, the locally made charter is framed by an elected board or commission and submitted to a vote of the

[2] Missouri (1875); California (1879); Washington (1889); Minnesota (1896); Colorado (1902); Oregon (1906); Oklahoma (1908); Michigan (1908); Arizona (1912); Ohio (1912); Nebraska (1912); Texas (1912).

people. Amendments are also made subject to a referendum. But the plan of granting home rule by constitutional provision has produced some unhappy consequences. It is easy enough to say that cities may adopt charters for their "own government," or regulate their "municipal affairs," or exercise "all powers of local self-government," but what do these undefined phrases mean? Who shall decide whether this or that specific matter is a proper subject for regulation and control by a municipality? And where a state law covers the same subject matter as a charter provision, who shall declare whether this matter is one of state or of local concern? It is the courts that have been saddled with the almost impossible duty of defining the vague and uncertain terms in which these constitutional grants of power have been made, and out of this situation a very considerable body of complicated case law has developed.[3]

It may well be asked whether a grant of home-rule powers actually necessitates so radical a step as the delegation of charter-making authority. In answer to this question several observations may be made. In the first place, it is difficult to see how any substantial grant of self-governing powers could be made without giving cities the power to alter the elaborate and often highly restrictive charters under which many of them are operating. In the second place, as already remarked, our concept of the proper scope of a charter has certainly expanded. A grant of power to the people of a city is not necessarily identical with a grant to the corporate authorities of the city. A fair-sized charter,

[3] For an analysis of the numerous cases, see McBain, *The Law and the Practice of Municipal Home Rule.*

a local fundamental law, setting the metes and bounds within which these corporate authorities must operate, is doubtless so desirable that it may be said to be indispensable. In the third place, it is practically impossible in the usual modern charter to consider the powers granted as something separate and distinct from the organization of the government. Few powers are granted to the city as a city; most powers are conferred upon specifically designated corporate authorities. In other words, powers are distributed with direct reference to the organization provided; and the organization is created with direct reference to the powers conferred. It is practically inconceivable, therefore, that a city could enjoy any considerable measure of home rule unless it were competent to alter the organization of its government, which means inescapably that it must be endowed with some portion or the whole of the charter-making power.

The legal problem involved in a legislative grant of home rule

It is well known that the attitude of state legislatures toward cities has undergone something of a change within comparatively recent years. It is probable that many legislatures would be willing to grant a considerable measure of self-governing power if they considered that they were competent to do so under the usual terms of our state constitutions. A grant of home rule by statute rather than by constitutional provision has many arguments in its favor. Imperfections in the machinery for the exercise of such power could be much more easily rectified. The scope of matters to be regu-

lated by the locally made charter could be defined by the legislature instead of by the courts; and, after all, it seems clear that the determination of the actual extent of powers to be exercised is wholly a question of policy and not at all a question of law. As such, it is a question calling for legislative rather than judicial settlement. When it is considered, moreover, that our methods of dealing with governmental problems must of necessity be subject to change—that a function which at one time may be regarded as primarily one of local concern may at another time call for regulation and control by the state—is it not apparent that readjustments between the city and the state in the matter of their respective spheres of control are from time to time indispensable? Is it not also apparent that such readjustments may be more easily and more satisfactorily effected by the amendment of a statute rather than by the process of constant tinkering with the state constitution? On the whole, it seems not to be denied that *if* an adequate measure of home rule for cities *can* be secured by legislative grant, this would be preferable to the plan of cementing a possibly large but unquestionably vague grant of power in the fundamental law of the state.

The question before us, then, is whether the legislature, in the absence of a specific grant of authority, has the constitutional power to institute this reform for which there is so much clamor. This question brings up for consideration a fundamental rule of American constitutional law—the rule which declares that the legislative power that is vested in two designated houses of legislation may not be delegated. The books are full of

cases involving the application of this rule in one connection or another. It would be impossible, even if it were desirable, to attempt here anything like an exhaustive analysis of all that the courts have said upon this subject.[4] A few points, however, are of especial interest.

If it be conceded that a grant of adequate home rule to cities necessitates a devolution of some portion or the whole of the charter-making power, it is manifest that this power must be conferred either upon some ordinary or specially chosen corporate body of the city, or upon the local electors, or upon a combination of the two. This being so, it is of importance to consider the rule of non-delegation of legislative power, first, in its application to the powers that may be delegated to the corporate authorities of cities, and second, in its application to the reference of legislative charters to the local voters for acceptance or rejection.

The delegation of legislative power to the corporate authorities of cities

It has been universally conceded that the legislature may delegate to the corporate authorities of a city the power to enact by-laws and ordinances which have the force of law—which are, indeed, nothing more nor less than laws, regulating, as they often do, precisely the same subjects that are regulated by acts of the legislature itself. The practice of delegating such power as this is of ancient origin, and it is well-nigh inconceivable that a city without such power could operate as a

[4] For a more detailed discussion of this entire subject, see McBain, *The Delegation of Legislative Power to Cities*, in *Political Science Quarterly*, XXXII, pp. 276 and 391.

municipal government at all. Here, then, is at least one universal exception to the rule against the delegation of legislative power. Nor have the courts been at any pains to define or delimit the scope of subjects that might be given over to regulations by local ordinance. The legislature has been at complete liberty to cover this or that subject by statute or to delegate control over it to the municipal authorities.

In a few cases, however, it has been held that the legislature may not delegate to the corporate authorities of cities the power to alter in any respect the provisions of the charters under which they are operating.[5] Two recent New York statutes are of especial interest upon this point. One of these, the so-called home rule act of 1913,[6] apparently attempted to confer upon cities powers not only in addition to those already granted by their charters but also in conflict with existing charter limitations. This law was so broadly drawn and embodied so much of uncertainty that the cities of the state did not hasten to avail themselves of the opportunities which it may possibly afford. However, in the opinion of the attorney general of the state[7] the law did not intend to allow cities to regulate all matters relating to the conditions and relationships of the local corporate authorities or to delegate the power to change the form of government of the city. Further than this, the view was expressed that "*such power would be in-*

[5] Haywood *v.* Mayor, etc. of Savannah, 12 Ga. 404 (1853); State *v.* Field, 17 Mo. 529 (1853); Dexheimer *v.* City of Orange, 60 N. J. L. 111 (1897). See also Attorney General *ex rel.* Booth *v.* McGuinness, 78 N. J. L. 346 (1909).

[6] Laws of New York, 1913, ch. 247.

[7] Report of the Attorney General of New York, 1913, II, p. 375.

effectual if attempted to be granted." In other words, it was evidently the attorney general's opinion that the power to amend the local charter and thus to repeal a state law had not been granted by this law and could not be constitutionally delegated.

The so-called optional city government law, enacted by the legislature of New York in 1914,[8] has also been under review by the attorney general of the state in respect to this same point. This law, which allowed any city of the second or third class to adopt any one of six forms of government, clearly vested in the corporate authorities of such city the power to repeal by ordinance certain portions of the old charter that were not directly repealed by the adoption of the new law. The attorney general held that it was beyond the power of the legislature to "authorize a municipal corporation to repeal by ordinance a statute of the state." There was, in consequence, insuperable objection "to any attempt to delegate to the council of such city the power to say which part of the existing charter shall be retained and which part of it rejected."[9]

Now there is no question that the legislature is fully competent to make the charter of a city a very brief instrument, vesting in the corporate authorities created by such instrument large powers to elaborate the local government by ordinance. In the case of existing charters the legislature may certainly accomplish this by direct repeal of specified charter provisions. Why, then, may not the legislature vest in the local authorities of a city the power to repeal designated provisions

[8] Laws of New York, 1914, ch. 444.

[9] Opinion of the Attorney General of New York, January 11, 1916.

of the charter under which the city is at the time operating? "It makes no difference," says the attorney general of New York, "whether they [city charters] contain provisions which the legislature might in the first instance have delegated the power to enact to the local council. The answer to that is the legislature did not delegate the power in the existing charter, but made its own special provisions." If one regards the substance of things, this argument is certainly somewhat attenuated. It amounts to this—that having occupied a particular field through the medium of a charter provision, the legislature cannot thereafter retire from that field by delegating to the local authorities power which it might in the first instance have delegated with impunity.

Of course it is clear that the corporate authorities of a city would never be vested with power to repeal a charter *in toto*. Only a partial power would be conferred. Otherwise, since whatever the corporate authorities enact is in the nature of ordinance, and therefore subordinate, the distinction between the charter and the ordinances of the city would be completely destroyed. Something of the charter enacted by the legislature would have to remain, even though it were nothing more than the provisions creating those corporate authorities who were empowered to repeal the rest of the charter, and thus reduce its provisions to the status of local ordinances. State constitutions occasionally contain regulations that are expressly made subject to alteration by the legislature. When the legislature acts under an authority of this kind it does not, strictly speaking, amend the constitution; it merely transforms

a subject of constitutional regulation into one of statutory regulation. But if the legislature were empowered to do this with *every* provision of the constitution, there would no longer be any distinction between the constitution and the statutes of the state. And so it would be in respect to the alteration of charters by action of the corporate authorities.

Over against the few opinions of record in which it has been denied that the legislature is competent to authorize the local authorities to transform specified provisions of a charter into ordinances, may be set many important instances in which the legislature has actually exercised this competence without any resulting judicial controversy. If, for example, this rule of law is sound, then numerous provisions of the present building code of the city of New York are void; for the charter which created Greater New York in 1897 expressly provided that upon the enactment of a building code by the municipal assembly (now the board of aldermen) all statutes relating to buildings should be repealed; but "such repeal," declared the charter, "shall not take effect until such 'building code' shall be established."[10] Many other provisions of this charter were made subject to transformation into local ordinances.[11] Moreover, when the charter of the city was fundamentally revised and re-enacted in 1901, no less than fifty-six sections were expressly scheduled as "sections to remain in force until changed by the board of aldermen."[12] So, also, when the charter of the city of

[10] Laws of New York, 1897, III, sec. 647.

[11] Salaries, for example, could be fixed by ordinance "irrespective of the amount fixed by this act." *Ibid.*, sec. 36.

[12] Laws of New York, 1901, III, p. 663.

Boston was remodeled in 1909, the mayor and city council were vested with far-reaching power, subject to certain specified exceptions, to reorganize the administrative departments of the government, and to redistribute powers regardless of unrepealed provisions of the existing charter.[13]

Instances might be multiplied, but these are doubtless sufficient. If there exists in the body of our constitutional law a rule that the corporate authorities of cities may not be granted the power to reduce specific provisions of a municipal charter to the grade of ordinances, it is passing strange that this rule has escaped attention in the important instances mentioned. The only explanation is that it has been applied in too few cases and rests upon too insecure a foundation in reason to warrant the assertion that it is an established rule of law.

There is probably no doubt that, with the legislative practice in this regard fairly established, a considerable measure of home rule could be granted to cities by vesting in their corporate authorities the power to regulate by ordinance certain matters that are now regulated by charter provision. This would undoubtedly be a means of simplifying some of our overgrown city charters. But if this policy were adopted only upon a niggardly scale, it would scarcely satisfy the reasonable demands for municipal home rule. If, on the other hand, it were adopted upon an extensive scale, it would run counter to the prevailing notion that the corporate authorities of a city ought to be held in the leash of a fair-sized fundamental law. As has been said, home rule for

[13] Acts and Resolves of Massachusetts, 1909, ch. 486, sec. 5.

cities does not necessarily imply that large unrestricted power shall be placed in the hands of a few corporate officers. Many earnest advocates of the principle of home rule would hesitate to urge that the charter of a sizeable city be decreased to a document of a few pages, and that enormous powers be vested in the few authorities established by this greatly abbreviated fundamental law.

It is nevertheless true that, so far as the practice of our legislatures is concerned, the corporate authorities of cities have not infrequently been vested with power to transform specified charter provisions into ordinances subject to their control; and not only has the competence of the legislature to delegate such power been seldom questioned but it can also be supported by considerable force of logic. Strictly speaking, this practice cannot be referred to as a delegation of the charter-making authority; it is rather the delegation of power to unmake parts of the charter. The practice is, however, of obvious interest, even though not of controlling influence, in any consideration of the competence of the legislature to delegate the charter-making power to cities.

The reference of charters to the electors

It is a well-known fact that in numerous instances legislatures have submitted laws for approval or rejection by the voters. Such laws have sometimes been submitted to the voters of the entire state and sometimes to the voters of local units, such as counties, towns, and cities. Many of these laws have been contested before the courts upon the ground that, in pro-

viding that a law shall depend for its existence or enforcement upon the will of the voters as expressed at the polls, the legislature in effect delegated its own power of legislation. Without attempting to make anything like a complete examination of all the intricacies involved in this proposition, it seems obvious that the competence of the legislature to refer to the local voters at least certain kinds of laws can be readily sustained. For example, it is universally conceded that the power to prohibit or regulate the sale of intoxicating liquors, or to levy a tax or issue bonds for a local public improvement can be delegated to the corporate authorities of cities, to be exercised by ordinance. But since these authorities are merely the agents of the local voters, surely there can be no logical reason why the power to accept or reject a liquor law or financial law may not be delegated directly to the local voters. It is simply a fact that the reference of such laws to the local voters has been almost universally upheld, although it ought to be said that not all of the courts have relied solely upon the line of argument thus indicated.

There is, however, another class of laws which the courts have permitted the legislature to refer to the local voters for acceptance or rejection. These are municipal charters and charter amendments. Almost from the beginning of our history as a nation, legislatures have on occasion allowed municipal voters to ratify or reject charters and similar laws affecting them. This practice has been far more prevalent in some states than in others, and although it has been far from uniform in any state—has, indeed, been far more excep-

tional than otherwise—it has, nevertheless, had a considerable vogue.

Most of the diverse arguments that have been put forward by the courts in support of referenda on charters and analogous laws have been directed to showing that in voting for or against such a law, the voters do not in fact participate in the making of the law and do not, therefore, exercise legislative power. It seems wholly unnecessary to attempt an analysis of all of the arguments that have been employed to this end. Perhaps the principal of these has been that in accepting or rejecting a charter or similar law, the voters do not act as legislators but as corporators. Their action, say the courts, is precisely the same as the action of a group of natural persons who accept or reject articles of incorporation for the carrying on of some private undertaking. From the historical point of view there is something of force in this argument. From the modern point of view it is manifestly the thinnest sort of fiction. The charter of a private corporation is a contract between the state and the incorporators. No group of private persons can be compelled to incorporate, and, once being incorporated, the obligation of their contract with the state cannot be impaired by subsequent legislation. The charter of a municipal corporation is not a contract between the state and the voters of the city. Such a charter can be forced upon the community against its will, and, once in operation, it can be "violated" by the legislature without the slightest regard for the wishes of the people of the locality. It is impossible to follow with conviction a line of argument which asserts, on the one hand, that the legislature may

allow the voters of a city to accept or reject a municipal charter for the same reason that it may allow persons to accept or reject a private charter of incorporation; but that, on the other hand, the legislature may *compel* the acceptance of a municipal charter for the reason that such a charter lacks the most essential element of a private charter; namely, its contractual character. In view of the mandatory character of most of the laws regulating the governments of modern American cities, the average voter would doubtless be surprised indeed to discover that he has any capacity as a corporator of the city. As a citizen, as a voter, as a taxpayer, as a person, he of course has rights which he may defend before the courts under the guaranties of the fundamental laws of the state and nation. As a corporator of the city in which he lives, he obviously has no such rights.

It would certainly assist in clearing the legal atmosphere which surrounds this subject if the courts would frankly abandon this fiction of the law based upon the analogy between the acceptance of a municipal charter and the acceptance of a private charter. Because of its local and special application a law for the governance of a city is none the less a law enacted *by* the entire state. It is the mandate of a superior to an inferior; and when that superior permits the inferior to declare, through the medium of ballots cast at the polls, that such proposed law shall or shall not be the law (or, what is substantially the same, that it shall or shall not be enforced), there seems to be no question that the local voters do in fact participate in the making of the law and therefore exercise legislative power. Their act is as

truly legislative as the act of an individual legislator when he votes upon a bill in its final form. It is as truly legislative as the act of the governor when he approves or vetoes a bill that is submitted to him. It seems impossible to escape this conclusion; for it is perfectly apparent that without the approval of a majority of the voters who go to the polls, the charter law is as ineffective, as utterly nugatory, as if it had never been enacted by the legislature.[14]

If the courts would only concede, then, as it would seem they ought to concede, that the vote of the local electors upon a charter or similar law is an act of legislation, a long step would be taken in the direction of sustaining the competence of the legislature to grant the charter-making power to cities. It would not be necessary to declare that the legislature could not submit such laws to the voters. The general rule against the delegation of legislative power is not an express prescription of the constitution; it is derived merely by implication from the clause which asserts that the legislative power of the state shall be vested in the legislature. The courts might easily declare that this clause

[14] In a recent case before the New York court of appeals it was declared that "no court has ever held that the legislature could delegate to popular vote the right to . . . repeal a statute." People *ex rel.* Unger *v.* Kennedy, 207 N. Y. 533 (1913). But in this case it was held that the law creating Bronx county out of a portion of New York county did not in fact delegate such power to the voters.

With due respect for the high source of this rule of law, it is nevertheless a fact that most of the laws that are submitted to popular votes operate to repeal other laws. The acceptance of a new charter by the voters of a city obviously repeals the old charter in whole or in part. Moreover, if the legislature is competent to permit the local voters to accept or reject a charter or any other law, it is difficult to see why the legislature is, after acceptance, powerless to permit a subsequent rejection in the form of a repeal of such law.

was intended only to establish the principle of the separation of powers—to prevent the delegation of legislative power to the courts or to the executive branch of the government—and that in consequence it did not of necessity prohibit the legislature from delegating legislative power to the voters. This would require no violent twisting of the terms of the fundamental law of the state. Courts have not infrequently refused to apply far more palpable implications than the one here under consideration. If the courts would take this stand, the competence of the legislature to submit charters to the voters could be sustained just as it has been sustained. The only difference would be that this competence would be rested upon a new, and, it would seem, a more substantial, foundation.

The delegation of charter-making power to the corporate authorities and the electors

We are in search of a line of consistent legal reasoning that will sustain the authority of the legislature to delegate to cities the power to make their own charters within such general scope and subject to such general limitations as the legislature may set. The preservation of the distinction between that which is charter and that which is ordinance is admittedly desirable. But this distinction is not always founded upon a difference in respect to subject matter, upon a conscious and consistent attempt to separate what may be regarded as fundamental from that which may not be so regarded. It rests solely upon a difference in the enacting authority. What the legislature enacts is charter, no matter how trivial may be its subject. What the

municipal authorities enact is ordinance, no matter how high and important its subject. Both are acts of legislation. In respect to the former, we have seen that the power to reduce designated charter provisions to the status of ordinances has in practice been delegated to the corporate authorities of cities, although a few opinions have denied the power of the legislature to make such a delegation. We have seen also that the competence of the legislature to submit a proposed charter or analogous law to the voters of a city has been universally sustained. Why, then, may not the legislature divest itself completely of the power of enacting municipal charters and vest such power in the local corporate authorities and the local electors acting in combination? If the legislature can devolve a portion of its power in this regard, why can it not devolve the whole of it?

As has been noted, the corporate authorities should not be vested with complete charter-making competence; for since what they enact is in the nature of ordinance, the distinction between the charter and the ordinances of the city would thereby be destroyed. On the other hand, the voters cannot act in the matter of charter-making except through some prescribed machinery; and any machinery that might be devised, except perhaps a machinery of initiative and referendum, would probably include at least initiatory action by some existing or specially constituted corporate body. The combination of proposal by such a body and ratification by the electors would preserve the distinction between the charter and the ordinances. What the voters acted upon in the prescribed manner would be

charter—the superior law of the city. What the corporate authorities alone enacted would be, as at present, ordinance.

There is another way of looking at this matter. In granting the charter-making power to cities it is not necessary and probably not desirable that the legislature should prescribe only the machinery for the exercise of the power. There are a number of moot questions of local competence that ought to be settled by statute, if for no other reason because the city should not be left in uncertainty concerning the metes and bounds of its powers in respect to dubious matters. In Michigan and in Texas the power to frame their own charters is delegated to cities by constitutional provision; but the legislature may determine not only how this power shall be exercised but also its scope. In each of these states the legislature has enacted a somewhat elaborate "home rule" or "enabling" act.[15] If such a law were enacted in a state containing no constitutional provision on this subject, there seems to be no reason why this law might not itself be regarded as the fundamental law of every city. Such it would be in fact, no matter what it might be called. It would not do, perhaps, to call it the charter of the city; for this would only result in a confusion of terms, and it is doubtless desirable to retain the term charter as descriptive of the instrument which actually provides the organization of the local government. It might readily be argued, however, that in enacting such a law the legislature had exercised all the legislative power neces-

[15] Public Acts of Michigan, 1909, no. 279; General Laws of Texas, 1913, ch. 147.

sary for the creation and regulation of municipal corporations; that it had merely delegated a larger *degree* of local legislative power than has been customary; and that it had provided for the division of the power so delegated into two parts—namely, the power of charter-making, in which the voters should participate, and the power of enacting ordinances, which should be regulated by the provisions of the locally made charter.

The difficulty of following this argument, if any there be, arises almost wholly from the use of old terms to describe a somewhat new statutory situation. If the home rule act passed by the legislature were called the charter of the city, if the charter ratified by the voters were called—let us say—the "fundamental ordinance" of the city, and if the ordinances enacted by the corporate authorities were called by some appropriate term to indicate their inferiority, the difficulty of sustaining the constitutionality of such a legislative act, so far at least as nomenclature is concerned, would be largely, if not entirely, overcome.

Legislative grants of home rule

There remains, in conclusion, only to mention the few instances in which legislatures have, without express constitutional sanction, attempted to delegate to cities a more or less complete charter-making power. In the year 1828 a charter proposed by the state legislature for the city of New York was submitted to a local referendum and was defeated at the polls.[16] Thereafter the corporate authorities of the city, without any express

[16] Laws of New York, 1828, First Sess., ch. 249.

sanction of law, provided for the election of members of a municipal convention which should draft a charter for the city. In 1829 this convention assembled and framed a charter which was submitted to and approved by the voters. At its next session, the legislature enacted this charter without amendment.[17] In 1846 the legislature itself made provision for the election of members of a similar municipal convention to revise the charter of New York City.[18] The charter that was drafted by this convention was defeated at the polls; but shortly afterward a charter proposed by the board of aldermen of the city was enacted by the legislature, submitted to the electors, and by them approved.[19] In Brooklyn also a charter convention came together in July, 1847, under the sanction of a legislative enactment.[20] The labors of this convention were not completed until the beginning of the year 1849, when a proposed charter was, as required by law, "printed for distribution among the inhabitants of said city." This charter was enacted by the legislature but was made subject to approval by the voters.[21]

These are early instances in which the propriety of permitting localities to draft their own charters was recognized apparently without hesitation. Certain recent instances of a similar character may also be noted. By a law of Oregon enacted in 1901 twenty-three designated voters of the city of Portland were empowered to draft a charter which should be approved

[17] Laws of New York, 1830, ch. 122.
[18] Laws of New York, 1846, ch. 172.
[19] Laws of New York, 1849, ch. 187.
[20] Stiles, *History of Brooklyn*, II, p. 279; Laws of New York, 1847, ch. 246.
[21] Laws of New York, 1849, ch. 47.

by the voters and subsequently submitted to the legislature "for its approval or rejection as a whole, without power of alteration or amendment."[22] So also a statute of Virginia enacted in 1914 authorizes cities of more than 100,000 inhabitants (Richmond) to *propose* new charters to the legislature, the procedure for proposal being that such charters should be enacted by ordinance and submitted to a vote of the people.[23] In 1915 a law of the same state authorized fifteen per cent. of the electors in cities having a population of from 75,000 to 100,000 inhabitants (Norfolk) to petition for the election of a charter commission. The charter drafted by this commission should, upon approval by the voters, "constitute a request to the general assembly to grant the said special charter or form of government provided for therein."[24]

So far as legal principles are concerned, it is manifestly important to note that each of the instances just mentioned involved or involves direct action upon the charters in question by the legislature itself. From the viewpoint of political psychology it is nevertheless apparent that a legislature would hesitate to amend or

[22] General Laws of Oregon, 1901, p. 296. It is questionable, of course, whether the legislature of 1901 could bind the legislature of 1903 to approve or reject the charter without power of amendment.

[23] Acts of Assembly of Virginia, 1914, p. 81. This act was amended in 1916 so as to provide for the drafting of the charter by an elected commission; *ibid*, 1916, p. 116. A constitutional amendment (sec. 117), adopted in 1912, authorized the legislature to "grant a special form of government," "*at the request*, made in manner which may be prescribed by law, of any city having a population of over 50,000 inhabitants." Obviously the legislature of any state would enjoy such power without constitutional sanction unless prohibited by a requirement of general legislation for cities.

[24] Acts of Assembly of Virginia, Ex. Sess., 1915, p. 80d; revised and reenacted as applicable to cities of from 65,000 to 100,000; *ibid.*, 1916, p. 62.

to refuse to enact a charter which had been approved by the voters of a city.[25]

It is interesting in this connection to note that the New York municipal convention of 1846 regarded the legislative ratification as of so little importance that they incorporated into the charter which they drafted and which was defeated at the polls a provision for the future amendment of that charter by local action *without* legislative approval.[26]

Of very much greater importance than the instances just mentioned are those in which the legislature has delegated to cities the complete power of charter-making without reserving to itself the right of subsequent ratification. Probably the earliest instance of this was found in an Iowa law of 1858 which conferred upon existing cities the power to amend their charters by initiative petition and referendum vote.[27] Without considering the question of the delegation of legislative power this law was enthusiastically approved by the supreme court of Iowa[28] and still remains upon the statute books as applicable to cities which have not voluntarily adopted the general charter law.[29] So also in Mississippi a law which provides for the amendment

[25] In California under the constitutional provision granting home rule to cities all charters and charter amendments must, after local drafting and adoption, be submitted to the legislature for approval. In the entire history of home rule in that state covering the enactment of numerous charters and amendments, the legislature has never refused its approval. See McBain, *The Law and the Practice of Municipal Home Rule*, pp. 218–220.

[26] *Journal of the City Convention*, 1846, p. 715.

[27] Laws of Iowa, 1858, ch. 157, sec. 111.

[28] Von Phul *v.* Hammer, 29 Ia. 222 (1870); *Ex parte* Pritz, 9 Ia. 30 (1859); Davis & Bro. *v.* Woolnough, 9 Ia. 104 (1859); Hetherington *v.* Bissell, 10 Ia. 145 (1859).

[29] Iowa Code of 1897, sec. 1047.

of city charters by local action without legislative ratification has been approved by the supreme court of the state.[30] The supreme court of Illinois has also expressed the opinion, *arguendo*, that the legislature might provide for the incorporation and alteration of the charters of cities "in the discretion and through the agency of those to be affected;"[31] but the legislature of that state has never adopted any such policy.

In Louisiana, under a law of 1886, any city except New Orleans may amend its own charter or adopt an entirely new charter upon a petition by taxpayers or property owners and ratification by the electors. This law appears never to have been contested before the courts and probably has been infrequently used, owing to the large majorities required for petitions.[32] In South Carolina by statutory allowance amendments to any special charter or general act of incorporation may be initiated by a petition of the majority of the freeholders of the city and ratified by a majority vote of the electors.[33] This law also seems never to have been contested and probably for the same reason as in Louisiana has seldom, if ever, been made use of. In Florida charter-making power has been extended to certain specific cities by the terms of somewhat recently

[30] Code of Mississippi, 1892, sec. 3039; amended by Laws of 1900, ch. 69; Code of 1906, sec. 3444; sustained in Yazoo City *v.* Lightcap, 82 Miss., 148 (1903). The procedure provided is enactment by the mayor and council, approval by the governor and attorney general, and ratification by the electors only in the event of a protest filed by one-tenth of the voters. In possible support of such a law was the phraseology of section 88 of the Mississippi constitution of 1890.

[31] People *ex rel.* Miller *v.* Cooper, 83 Ill. 585 (1876).

[32] Acts of Louisiana, 1886, p. 138; *ibid.*, 1896, p. 190.

[33] Acts of South Carolina, 1899, p. 70.

enacted special charters;[34] and although the power thus conferred has certainly been exercised by Florida cities in some instances, it has apparently not been contested before the courts. Within the last few years the legislature of Connecticut has granted the charter-making power to one or two cities. Thus by a law of 1913 the city of New Haven is authorized to amend its charter by initiation of the board of aldermen or a voters' petition and subsequent ratification at the polls.[35] A similar law was enacted for Waterbury in 1915.[36] It remains to be seen whether the Connecticut courts will sustain such delegations of power if any judicial contest is raised over an attempted exercise.

It appears, therefore, from the above review, that laws granting the charter-making power to one or more cities are found in the statute books of at least six states —Iowa, Mississippi, Louisiana, South Carolina, Florida, and Connecticut. In two of these, Iowa and Mississippi, such laws have been expressly upheld by the courts. In none of them does the constitution specifically authorize the delegation of the charter-making power.

On the other hand, laws of the kind here under consideration have been held void in at least two jurisdictions. In Michigan, before the grant of home rule by the constitution of 1908, a law was declared void which provided for amending the charter of Detroit by the proposal of the mayor and council or of 500 petitioners and subsequent ratification by the electors. In the opinion of the court this was an unconstitutional del-

[34] See, for example, the charter of Gainesville; Laws of Florida, 1907, p. 399.

[35] Special Laws of Connecticut, 1913, p. 817; amended, *ibid.*, 1915, p. 335.

[36] *Ibid.*, 1915, p. 439.

egation of legislative power.[37] So, also, a recent Wisconsin law was held invalid which conferred upon cities the power to amend their charters by action of the corporate authorities and approval by the voters or by initiative petition and like approval, and which conferred also the power of enacting a new charter to be drafted by an elected municipal convention and ratified by popular vote.[38] In the opinion of the court the making and amending of charters was a "legislative function at common law;" moreover, it was made exclusively such by a provision of the Wisconsin constitution which commanded the legislature "to provide for the organization of cities."[39]

It ought to be said that in none of the cases involving a question of the delegation of charter-making power to cities has this question been considered in the light of the universally approved rule that charters and charter amendments may be submitted for approval or rejection by the local voters, nor in the light of the fact that the power to reduce charter provisions to the status of ordinances has been frequently conferred upon

[37] Elliott *v.* City of Detroit, 121 Mich. 611 (1899).

[38] Laws of Wisconsin, 1911, ch. 476; State *ex rel.* Mueller *v.* Thompson, 149 Wis. 488 (1912).

[39] The supreme court of Vermont recently held void an act which conferred upon the Public Service Commission power to incorporate villages (determining their powers and form of government) and to amend city and village charters on petition. Opinion of Justices, 86 Atl. 307 (1913). So also the West Virginia court held that the legislature could not vest in the circuit court the power to amend the special charters of cities of more than 2000 inhabitants. St. Marys *v.* Woods, 67 W. Va. 110 (1910).

Neither of these opinions is directly in point with our discussion of home rule. They involved the question of the delegation of legislative power to state administrative and judicial officers respectively.

the corporate authorities of cities. Indeed, it must be admitted that the entire line of reasoning pursued in this discussion has been based not so much upon the law as it is as upon the law as it might and perhaps ought to be. If the law as it is were clear, consistent, and firmly established, there would perhaps be little justification for urging a new point of legal attack and pursuit. But in plain point of fact the law upon this subject enjoys none of these characteristics. It stands in bewildering uncertainty, while cities are clamoring for home rule. It may well be that home rule by legislative grant will in the long run prove more satisfactory than home rule by constitutional grant. Would it not be regrettable, therefore, if the rule against the delegation of legislative power, with all of its numerous ramifications and inconsistencies, should be allowed to stand in the way of any legislative attempt to work out an adequate scheme of relations between the city as such and the state of which it is a part?

CHAPTER II

BREAKING DOWN THE RULE OF STRICT CONSTRUCTION OF MUNICIPAL POWERS

It has been pointed out that in the usual modern charter the grant of powers to municipal corporations is made with great specification, and that powers are commonly granted not to the city as such but to designated corporate authorities of the city. We come now to consider the attitude which the courts have taken in construing the powers thus granted. Judge Dillon, the best-known commentator upon the law of municipal corporations, has expressed as follows the general rules or canons of construction which the courts apply:[1]

> It is a general and undisputed proposition of law that a *municipal corporation possesses and can exercise the following powers and no others:* first, *those granted in express words;* second, *those necessarily or fairly implied in* or *incident to* the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of a power is resolved by the courts against the corporation, and the power is denied.

"*These principles*," he adds, "*are of transcendent importance and lie at the foundation of the law of municipal corporations.*" The rules thus set forth were expressed in effect by many courts prior to their formulation by

[1] Dillon, *Municipal Corporations*, 5th ed., I, sec. 237.

Judge Dillon, and they have been repeated down to the present day in countless cases involving questions concerning the competence of a city to exercise this or that specific power. Of course like any other general rule of law these rules give the opportunity for some latitude in application. It is easy enough to say that there must be fair implication that a certain power has been granted by the charter; but judges will naturally differ in opinion as to what is and is not a fair implication. They will differ also as to whether a particular power is indispensable to the declared objects and purposes of a municipal corporation. At best, however, it is obvious that these canons of construction are expressed in terms calculated to defeat anything like a free and easy exercise of the powers granted to cities. More especially is this the case in view of the minuteness with which the powers of a city are often enumerated.

Loose vs. strict construction of enumerated powers

At first blush it may seem far-fetched to contrast the grant of powers to Congress with the grant of powers to municipal corporations. There is, however, something of reasonable analogy between the two. In the first place, although the national government is the highest governmental unit in our system and municipal governments are almost the lowest units, they are nevertheless both governments exercising specifically enumerated powers. In the second place, the grant of powers to Congress terminates with a general grant of power "to make all laws which shall be necessary and proper for carrying into execution

the foregoing powers." Frequently municipal charters and codes follow the precedent set by the national constitution in this respect. Almost identical in phraseology, for example, is the clause of the Illinois general municipal code which declares that the council shall have power "to pass all ordinances, rules, and make all regulations, proper or necessary, to carry into effect the powers granted to cities or villages." Sometimes, indeed, the clauses in which these general or supplementary grants of power are made are apparently much more than "necessary and proper" clauses. For example, the law applicable to the third class of cities in Pennsylvania, after an elaborately detailed statement of the specific powers granted, terminates with a grant of power "to make all such ordinances, by-laws, rules, and regulations not inconsistent with the constitution and laws of this commonwealth as may be expedient or necessary *in addition to* the special powers in this section granted, for the proper management, care, and control of the city and its finances, and the maintenance of the business, good government, and welfare of the city, and its trade, commerce, and manufactures." Such clauses as this, commonly known as "general welfare" clauses, seem to express almost prodigal liberality toward the city in the matter of powers.

Now everybody knows how, under the construction of the United States Supreme Court, the "necessary and proper" clause of the federal constitution has been held to confer upon Congress enormous incidental powers. It is very nearly true to say that Congress may exercise almost any power that is remotely or

indirectly conducive to the effectuation of some specific power conferred. No other single canon of constitutional construction has had so far-reaching and continuous an influence upon the progressive evolution of the national government. It has introduced an elasticity and expansiveness without which it is difficult to see how the changing problems of our national economy could have been met.

It was, of course, somewhat natural for the courts to take a different attitude with respect to the powers of a subordinate unit of government from that which they assumed toward the powers of the highest government of the land. There is certainly no reason in law, however, why they might not have applied to the powers of cities a rule of loose construction similar to that which they applied to the powers of Congress, thereby furnishing to the city precisely the same elements of elasticity and expansiveness which were needed in the struggle of the city to meet the changing problems of municipal life. It is simply a fact that the courts did not do this.[2] They elected to regard the city as a corporation rather than a government; and they applied to the city the same rule of strict construction of powers that they applied in the case of private corporations.

[2] In Groner *v.* City Council of Portsmouth, 77 Va. 488 (1883), the rule of loose construction was applied to the powers of a harbor commission whose members were appointed by the governor. Said the court: "It is a well-settled principle, of frequent application, that a general grant of power implies the necessary means for carrying into execution the power granted. . . . This principle, so clearly stated and powerfully enforced by Chief Justice Marshall in McCulloch *v.* State of Md., 4 Wheat. 421, applies to, and is conclusive of, the present case." The application of this rule in construing the powers of such a body is certainly unusual.

Liberality toward the city in the earlier cases

There are in the books of record literally hundreds of cases involving the question of whether this or that power exercised or sought to be exercised by a city was embraced within the terms of its charter grant. The mere number of such cases makes any generalization, beyond the statement of the general canons of construction, somewhat difficult. It may doubtless be said, however, that in some of the earlier cases upon this subject there are a breadth of vision and a liberality of attitude that are not to be found in most subsequent cases. Thus, in a case decided by the United States Supreme Court in 1844 there was drawn into question the power of the city of Philadelphia to take and administer property that was bequeathed in trust to the city for certain specified educational, charitable, and other purposes. There was no pretense that the charter of the city conferred this power in express terms or even by specific implication. But since the charter did empower the city "to have, purchase, take, receive, possess, and enjoy lands," and since the preamble to the charter referred broadly to the "suppression of vice and immorality, to the advancement of public health and order, and to the promotion of trade, industry, and happiness," there was no doubt in the mind of the court that the city had power to accept this trust.[3] The rule of strict construction of corporate powers was not even mentioned. "It appears to us," said Justice Story, who delivered the opinion, "that any attempt to narrow down the powers of the corporation so as to exclude it from taking

[3] Vidal *v.* Girard's Executors, 2 How. 127 (1844).

property upon trusts for purposes confessedly charitable and beneficial to the city or public, would be to introduce a doctrine inconsistent with sound principles and defeat instead of promoting the true policy of the state." Here was certainly no pinched view of the manner in which municipal powers should be construed.

Again, in an early Maine case, although the specific power contested—the power to prescribe punishment for the mutilation of trees planted in the streets—was not of much importance, the court, without any recital of the rule of strict construction, declared broadly that under the charter authority "to ordain and publish such acts, laws, and regulations, not inconsistent with the constitution or laws of the state, as shall be needful for the *good order* of the city," the municipal corporation might "establish all suitable ordinances for the government of the city, the preservation of the health of the inhabitants, and the convenient transaction of business within its limits, and for the performance of the general duties required by the law of municipal corporations."[4]

So also in an early Alabama case, the power of a city to bore an artesian well for the supply of water to the inhabitants was sustained under the authority conferred by the charter to "pass all such orders, by-laws, and ordinances . . . that shall be necessary for the

[4] State *v.* Merrill, 37 Me. 329 (1853). Commenting on this expression of opinion Judge Dillon declared: "Such would undoubtedly be the proper construction if this were the only power given to the city to pass ordinances or by-laws. It should then be somewhat liberally construed. But if such a general grant is given in connection with, or at the end of, a long list of specific powers, perhaps so extended a construction might not be due it." *Municipal Corporations*, 5th ed., sec. 718, note.

security and welfare of the inhabitants thereof, and for preserving health, peace, order, and good government within the town."[5] Although the court in this case referred to the rule of construction applied to corporate powers, the rule was set forth in much less exacting form than that into which it later became solidified. More important still, the view was advanced that it was wholly unnecessary to specify in the charter the "ordinary" powers of a city, such as the power to furnish a supply of water; it was necessary only to enumerate such "extraordinary" powers as the legislature might see fit to delegate.

It is worth noting in this connection, also, that the early statement of the rule of strict construction was sometimes quite different from its later formulation. By no means all of the cases which have construed the powers of cities with strictness have in fact been to the disadvantage of the city viewed as a community of people rather than a legal entity. Not infrequently the rule of strict construction has been applied to defeat a misuse of power by the corporate authorities of the city. In some of the earlier cases, therefore, it was declared not that any doubt concerning the existence of a power must be "resolved *against the corporation*," but that such doubt was to be "resolved *in favor of the public.*"[6] The difference is obvious. A doubt resolved in favor of the public might, according to circumstances, be either "for" or "against" the corporation.

[5] Intendant and Town Council of Livingston *v.* Pippin, 31 Ala. 542 (1858).

[6] See, for example, Minturn *v.* Larue, 23 How. (U. S.) 435 (1859); Seybert *v.* City of Pittsburgh, 1 Wall. (U. S.) 272 (1863); Reinboth *v.* Councils of Pittsburg, 41 Pa. St. 278 (1861).

Examples of the rule of strict construction

From the innumerable cases involving the construction of municipal powers, it will be sufficient to instance a few in order to illustrate the character of the questions that have arisen and the variations in the way in which the rule of strict construction has been actually applied by the courts.

It seems almost impossible to believe that fifty or sixty years ago municipal corporations in all parts of the country were engaged in a wild scramble to subscribe to the stock of, or make donations to, railway corporations. The exercise of this particular power by cities and other local corporations is now almost wholly a matter of historical interest. But a large amount of litigation arose out of this situation, and especially out of the later attempts of cities to disentangle themselves from unhappy financial consequences. Not infrequently was the point raised that an expenditure for railway aid had been made which it was beyond the power of the city to make. In the beginning the Supreme Court of the United States, like most of the state courts, assumed a very liberal attitude toward the competence of cities in this regard. Thus it was held in 1863 that the general power, subject to a referendum to the voters, to "borrow money for any object in its discretion" conferred upon a city the power to issue bonds in aid of a railway company.[7] So also it was held at the same term of court that power to subscribe for railway stock "as fully as any individual," included the power to issue bonds for this purpose, although the law granting this power made no reference to a bond

[7] Meyer *v.* City of Muscatine, 1 Wall. 384 (1863).

issue.[8] Two years later the same court held that bonds for railway aid could be issued under the general charter authority to borrow money, subject to the approval of two-thirds of the voters, "whenever in the opinion of the city council, it is expedient." There could be no "reasonable doubt," said the court, that this grant was "sufficiently comprehensive" for such a purpose.[9]

To any one who is acquainted with the many cases in which the powers of municipal corporations have been rigidly construed, these instances of interpretation by the highest court of the land must seem exceedingly liberal. In the course of a very short time, however, the disastrous financial results of the policy of government aid to railways became apparent in all parts of the country; and the attitude of the public mind upon this subject was clearly reflected in the later opinions of the courts. Thus in 1872 the United States Supreme Court was heard to declare that the implied power to issue municipal bonds in aid of railway companies "should not be encouraged or extended beyond the fair inferences to be gathered from the circumstances of each case."[10] Ten years later the same court held that the general power "to borrow money on the credit of the city and to issue bonds therefor" did not authorize the issuance of bonds to aid in the development of water power for the city.[11] In 1889 the court declared

[8] Seybert *v.* City of Pittsburgh, 1 Wall. 272 (1863).

[9] Rogers *v.* Burlington, 3 Wall. 654 (1865). See also Gelpcke *v.* Dubuque, 1 Wall. 175 (1863).

[10] Police Jury *v.* Britton, 15 Wall. 566 (1872); but see the Mayor *v.* Ray, 19 Wall. 468 (1873) and Converse *v.* City of Fort Scott, 92 U. S. 503 (1875).

[11] Ottawa *v.* Carey, 108 U. S. 110 (1882).

that the express power to subscribe to the stock of a railway corporation did not authorize a city to issue bonds to pay for the stock. The city would have to "provide for the payment of the stock in the ordinary way in which debts contracted by a town are met, that is, by funds arising out of taxation."[12] This decision was clearly out of harmony with the earlier decisions upon this subject, although these earlier cases were not expressly overruled.

These railway aid cases, it would seem, are fairly illustrative of the fact already mentioned—to wit, that while it is easy enough to formulate the rule of strict construction in general terms, the actual applications of the rule are undoubtedly subject to considerable variation at the hands of the courts.

Where the specific power has been granted to a city in somewhat general terms without any provision in respect to the manner in which the power is to be exercised, the courts have often declared that the determination of this manner of exercise is within the discretion of the municipal authorities. But again, the courts do not always agree in the actual application of this general principle. For example, the Illinois and Arkansas courts have held that the power "to regulate the inspection, weighing, and measuring of brick, lumber, fire-wood, hay, and any article of merchandise" does not by implication include the power to appoint weighmasters, and to compel persons engaged in the coal business to have all coal weighed and certified by these masters.[13] In New York, however, the power to appoint

[12] Hill *v.* Memphis, 134 U. S. 198 (1889).

[13] City of Savanna *v.* Robinson, 81 Ill. App. 471 (1898); Taylor Cleveland & Co. *v.* City of Pine Bluff, 34 Ark. 603 (1879).

weighmasters of coal was held to imply the power in the city to *compel* their employment by dealers;[14] and in Missouri the power to "regulate and establish standards of weights and measures" and to provide "for the inspection and weighing or measuring of hay or stove coal, charcoal, fire-wood, and all other kinds of fuel" was held to sanction an ordinance prohibiting the sale of coal unless the load had been "weighed by a weigher approved of by the mayor, and authorized by the law to weigh the same."[15] Somewhat the same rule of interpretation on this point has been applied in Iowa.[16]

In at least two jurisdictions, Missouri and Florida, it has been held that the power to enact an ordinance preventing cruelty to animals may be derived from a "general welfare" clause embodied in a municipal charter.[17] It has been held in Michigan that a city enjoys the power to erect a city hall by "general implication," even though the charter, which mentions specifically such things as waterworks, hospitals, markets, cemeteries, public grounds, and parks, contains no specific reference to a city hall.[18] So also in Nebraska the power to build a jail may be implied from the power to enforce ordinances by fine and imprisonment.[19] But in Missouri the power to "grant, purchase, hold and receive property real and personal" does not authorize a municipal corporation to acquire property for a park. In the view of the court the property which the city might

[14] Stokes *v.* City of New York, 14 Wend. (N. Y.) 87, (1835).

[15] Sylvester Coal Company *v.* City of St. Louis, 130 Mo. 323 (1895).

[16] Davis *v.* Anita, 73 Ia. 325 (1887).

[17] St. Louis *v.* Schoenbusch, 95 Mo. 618 (1888); Porter *v.* Vinzant, 49 Fla. 213 (1905).

[18] Torrent *v.* Muskegon, 47 Mich. 115 (1881).

[19] Dunkin *v.* Blust (Neb.), 119 N. W. 8 (1908).

acquire was only such as might be used for purposes specifically mentioned in the charter—property that might be necessary, for example, to execute the expressly granted power "to organize and maintain fire companies." [20]

The recital of such decisions as these is not in itself of especial interest. It serves merely to illustrate that the rule of strict construction is, after all, a more or less variable thing in application.

Implied power to grant franchises and to regulate public utilities

As might be expected, this question of how the powers of a city shall be construed has arisen frequently in connection with various matters relating to the subject of public utilities. It has usually been held, for example, that the power to contract with, or grant a franchise to, a more or less necessary public utility may be implied from other powers granted in a municipal charter. Thus the power "to prevent and extinguish fires" necessarily and fairly implies the power to contract for a supply of water.[21] Indeed the furnishing of water has come to be regarded as such a necessity in cities that the authority to contract for a water supply has been placed upon the broad grant of power to "enact such laws and regulations" as the city "may deem necessary . . . for the good order and welfare of said city." [22] On the other hand, it has almost in-

[20] Vaughn *v.* Village of Greencastle, 104 Mo. App. 206 (1903). See also in respect to the power to acquire parks by implication, Bloomsburg Improvement Co., *v.* Bloomsburg, 215 Pa. St. 452 (1906).

[21] Waterworks Company *v.* Webb City, 78 Mo. App. 422 (1898).

[22] City of Greenville *v.* Greenville Water Works Co., 125 Ala. 625 (1899).

variably been held that a city may not grant an *exclusive* franchise for the furnishing of any utility unless the power to make such exclusive grant is expressly conferred. This rule is one of those which has been laid down, not so much in derogation of the powers of cities as for the protection of the local public against a misuse of powers by the corporate authorities.[23]

When a city has an express or implied grant of authority to contract with or grant a franchise to a utility corporation, a distinction has been drawn between the power of the city to fix the rates in the franchise contract and its competence to regulate rates continuously under the police power. Its power to contract in respect to rates has usually been held to be implied if the city has power to contract for such purpose at all.[24] But the authority to enact police ordinances prescribing rates has usually been denied unless express warrant of the charter can be shown.[25] The difference is patent. In the one case the utility corporation, at the time when it enters into the franchise contract, *voluntarily accepts* the rates prescribed as one of the condi-

[23] Minturn *v.* Larue, 23 How. 435 (1859); Detroit Citizens' Street Railway Company *v.* City of Detroit, 110 Mich. 384 (1896); Detroit Citizens' Street Railway *v.* Detroit Railway, 171 U. S. 48 (1898).

[24] City of Indianapolis *v.* Gas-Light & Coke Co., 66 Ind. 396 (1879); Illinois Trust & Savings Bank *v.* Arkansas City, 76 Fed. 271 (1896); Omaha Water Co. *v.* City of Omaha, 147 Fed. 1 (1906); Muncie Natural Gas Co. *v.* City of Muncie, 160 Ind. 97 (1902); Zanesville *v.* Gas-Light Co., 47 O. St. 1 (1889); City of Noblesville *v.* Gas and Improvement Co., 157 Ind. 162 (1901); Western Paving & Supply Co. *v.* Railroad Co., 128 Ind. 525 (1891); City of Indianapolis *v.* Trust Co., 140 Ind. 107 (1894); City of Cleveland *v.* Railway Co., 201 U. S. 529 (1906); City of Detroit *v.* Railway Co., 184 U. S. 368 (1901); Boerth *v.* Detroit City Gas Co., 152 Mich. 654 (1908).

[25] For the general principle of strict construction see Interstate Commerce Commission *v.* Railway Co., 167 U. S. 479 (1897). See also St. Louis *v.* Bell Telephone Co., 96 Mo. 623 (1888).

tions of the contract. In the other case the city attempts to impose a rate *without* the consent of the corporation. Or, as it has sometimes been expressed, the one power is a part of the city's power to contract; the other is a part of its power to legislate.

While it is generally held that the power to regulate the rates and service of utility corporations (apart from contract stipulations) must be expressly conferred, the courts vary, as usual, in the way in which they actually apply this rule. Thus the United States Supreme Court, in a case decided in 1903, did not hesitate to reverse, in favor of the power of a city to regulate water rates, the decision of a lower United States court construing an ambiguously worded charter provision.[26] In other words, ambiguity was resolved in favor of, not against, the city as well as the public. So also the Illinois supreme court held that the city of Chicago had power to regulate street railway fares under a charter provision empowering the city to "license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation." [27] It is manifest that the court, had it so elected, might easily have held the street railway business to be an "occupation" unlike that of a cabman or porter or even an omnibus driver. On the other hand, the Indiana court, which has in some respects been conspicuously liberal in its construction of municipal powers, has held that in expressly granting the power "to require companies to change grades

[26] Owensboro *v*, Owensboro Waterworks Co., 191 U. S. 358 (1903).
[27] Chicago Union Traction Co. *v.* City of Chicago, 199 Ill. 484 (1902).

and crossings of their respective roads, and to raise or lower tracks in order to conform to any grade which may be established by ordinance," the legislature did not contemplate "the broad and extraordinary power of abolishing grade crossings within the city, and compelling the [railway] companies to construct and maintain a system of elevated tracks" within a prescribed district. All that the city could do under the apparently comprehensive grant was to require the abolishment of specific crossings found to be particularly dangerous.[28]

Implied power to own and operate public utilities

There is another group of cases relating to the power of cities in respect to local public utilities; these involve questions of the power of the city to own and operate public utilities in the absence of express grants of power. Mention has already been made of an early Alabama case in which it was held that a city might provide a water supply from an artesian well under a general grant of power to provide "for the security and welfare of the inhabitants thereof, and for preserving health, peace, order, and good government" within the city.[29] So also in an early Georgia case it was held that under the power to make such contracts as were "necessary for the welfare of the city" and to "levy a tax for the fulfilment of the same," the city was competent not only to construct a waterworks but also to issue bonds for this purpose. Such a service, said the court

[28] State *ex rel.* City of Indianapolis *v.* Indianapolis Union Ry. Co., 160 Ind. 45 (1902).

[29] Intendant and Town Council of Livingston *v.* Pippin, 31 Ala. 542 (1858), *supra*, 36.

was "necessary to the health and security of the city."[30] This decision was subsequently reaffirmed; and in a much later case the highest court of the same state declared that the power to erect and maintain not only a waterworks but also an electric plant could be sustained under the general charter grant of power "to do all things for the benefit of the city, and all things not in violation of the constitution and laws of this state." [31]

One of the most latitudinarian opinions ever expressed upon this subject was delivered by the supreme court of Wisconsin in 1895.[32] The municipal charter in question expressly declared that the city should have "no power to borrow money or contract any debt which cannot be paid out of the revenues of the fiscal year . . . except as otherwise provided" and that no money should "be appropriated for any purpose whatever, except as is *expressly* authorized by the city charter." No provision of the charter was cited which granted the power to construct either a waterworks or an electric plant. Brushing these facts aside, the court declared broadly:

> It is not necessary to seek for an express delegation of power to the city to build a waterworks and electric lighting plant in order to determine whether such power exists, for the general power in respect to police regulations, the preservation of the public health, and the general welfare includes the usual means of carrying out such power, which includes municipal water and lighting services.

This breadth of view is certainly highly commendable. Had it been the usual view of the courts, the en-

[30] Mayor and Council of Rome *v.* Cabot, 28 Ga. 50 (1859); reaffirmed in Wells *v.* Mayor and Council of Atlanta, 43 Ga. 67 (1871).

[31] Heilbron *v.* Mayor and Council of Cuthbert, 96 Ga. 312 (1895).

[32] Ellinwood *v.* City of Reedsburg, 91 Wis. 131 (1895).

cumbered pathway of more than one city would have been cleared, leveled, smoothed. It must be clearly recognized, however, that it is nothing more nor less than a complete repudiation of the usually applied doctrine of strict construction.[33] The court cited a number of cases in support of this expression of opinion; but none of the cases so cited was in point of fact rested upon so unqualified a declaration of the principle of law involved.

Very soon after the introduction of electricity for lighting purposes it was held in South Carolina that a city might acquire an electric light plant to be used exclusively for *public* lighting under the "general police power" conferred by the charter.[34] In North Carolina an interesting decision was handed down in 1903, in which it was held that the incurring of indebtedness for the construction of a water system and an electric light plant was a "necessary expense" within the meaning of that term as used in a municipal charter.[35] It does not clearly appear from the case whether or not the city was granted any express power to own and operate either of these utilities, but the opinion would seem to indicate the contrary. The view was expressed that

> In the efforts of the courts to check extravagance and to prevent corruption in the government of towns and cities, the judicial branch of the government has probably stood by former decisions from too conservative a standpoint, and thereby obstructed the

[33] In a dictum in McBean *v.* Fresno, 112 Cal. 159 (1896), the court said: "Proper sewers are in this day so essential to the hygiene and sanitation of a municipality that a court would not look to see whether a power to construct and maintain them had been granted by the charter, but rather only to see whether, by possibility, the power had been denied."

[34] Mauldin *v.* Greenville, 33 S. C. 1 (1889).

[35] Fawcett *v.* Mt. Airy, 134 N. C. 125 (1903).

advance of business ideas which would be most beneficial if put into operation; and this conservatism of the courts, outgrown by the march of progress, sometimes appears at a serious disadvantage.

In a recent Illinois case it was held that the power granted to cities to construct or acquire "street railways" included the power to construct or acquire a subway. "There is no difference," said the court, "between street surface railways and those constructed beneath the streets." This case is of interest not because of any extreme liberality but because the opposite view might easily have been taken had the court cared to apply anything like a rigid rule of interpretation.

It will be observed that the cases which have been noted show a decided judicial bent in the direction of sustaining the right of a city to own and operate public utilities even though the power may not be unmistakably granted by the charter. It is interesting to remark, moreover, that there are not many cases on this subject that lean toward the rule of very strict construction. This is doubtless due in large part to the fact that cities have not frequently undertaken to supply utility services where they have not been expressly empowered to do so. One or two cases on the opposite side may, however, be mentioned. Thus the New Jersey court of errors and appeals has declared that a law "authorizing the lighting of public streets and places in the cities, towns, and townships, boroughs and villages of the state, and to erect and maintain the proper appliances" for doing so, does not vest in a municipality the power to construct and operate an electric lighting

plant even though such plant be used for the sole purpose of lighting the streets and public places.[36] On the very face of things, this was, of course, an extremely contracted interpretation of the language of the statute in question. So, also, where the power to regulate the sale, manner of selling, and inspection of meats, and the power to "do all acts, and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease" were granted by the terms of the charter, it was held in Illinois that a city was nevertheless without power to establish a municipal abattoir.[37] Perhaps some extenuation for the refusal of the court to apply a liberal rule of construction in this case may be found in the fact that abattoirs are not among the utilities that are commonly owned by American cities.

Implied power to expand a utility into the commercial field

In the case of most municipal utilities it is possible to distinguish between two kinds of public service. Water is needed for fire protection, street cleaning, and other strictly public uses as well as for private consumption. Gas and electricity are required for lighting the streets, parks, and public buildings, as well as for distribution to residents. In a number of instances question has arisen whether under the terms of this or that charter a city empowered to own and operate a particular public utility could sell its service to private persons in addition to satisfying the more

[36] Howell *v.* Millville, 60 N. J. L. 95 (1897).
[37] Huesing *v.* City of Rock Island, 128 Ill. 465 (1889).

obviously public needs. The cases involving questions of this kind have arisen more frequently in respect to the utilities of gas and electricity than in respect to the supply of water, for the manifest reason, no doubt, that duplication in the matter of lighting services is at once more feasible and less absurd than in the case of the water service. In a few cases, however, contest has arisen even in respect to the sale of water to consumers. For example, in Tennessee, where the charter conferred the power to "provide the *city* with water by water works," the "city" was in effect construed to include the inhabitants as well as the corporate entity. The court regarded the clause as "very broad and comprehensive."

When it comes to the power of a city to engage in the business of commercial lighting without explicit authorization, the decisions of the courts are not in harmony. Thus in Massachusetts [38] and in Illinois [39] the power "to erect and maintain street lamps," or "to provide for lighting the streets, alleys, avenues, sidewalks, parks, and public grounds," has been held not to include the power to engage in commercial lighting. In Nebraska there is a dictum to the same effect,[40] while in South Carolina a similar narrow construction was perhaps fairly justified in view of the fact that the authority of the city to acquire the electric plant even for strictly public purposes was found only in a general charter grant of the police power.[41]

[38] Spaulding *v.* Peabody, 153 Mass. 129 (1891). This case was concerned with the implied powers of towns, not cities.

[39] Ladd *v.* Jones, 61 Ill. App. 584 (1895); Blanchard *v.* Benton, 109 Ill. App. 569 (1903); Palestine *v.* Siler, 225 Ill. 630 (1907).

[40] Christensen *v.* Fremont, 45 Neb. 160 (1895).

[41] Mauldin *v.* Greenville, 33 S. C. 1 (1889); *supra*, 46.

On the other hand, the authority of the city to expand the operations of a municipally owned lighting plant from the public into the commercial field has been sustained in Indiana under the power "to light the streets, alleys, and other public places of such city or town with electric light, or other form of light;"[42] in Florida under the power "to provide for lighting the city by gas or other illuminating material;"[43] in Iowa under the power "to establish and maintain electric light plants;"[44] in North Carolina, as already mentioned, under the authority to incur indebtedness for any "necessary expense;"[45] in California under the authority to "acquire, own, construct, maintain, and operate" a number of specified public utilities including "gas and other works for light and heat;"[46] while in Texas a city authorized to install an electric plant for lighting the streets may at least sell excess current to private citizens, "after discharging its duty to the public," even though some of the streets may not have been provided with light.[47]

It may perhaps be said, on the whole, that the weight of authority sustains the implied power of a city to furnish a utility service to private consumers where

[42] Crawfordsville *v.* Braden, 130 Ind. 149 (1891).

[43] Jacksonville Electric Light Co. *v.* Jacksonville, 36 Fla. 229 (1895).

[44] Thompson-Houston Electric Co. *v.* City of Newton, 42 Fed. 723 (1890).

[45] Fawcett *v.* Mt. Airy, 134 N. C. 125 (1903); *supra*, 46.

[46] Cary *v.* Blodgett, 10 Cal. App. 463 (1909); failing to follow Hyatt *v.* Williams, 148 Cal. 585 (1906), where the contrary rule was applied. See also Clark *v.* Los Angeles, 160 Cal. 30 (1911), where the Cary case was cited with approval, the specific question before the court being whether the city might furnish electric current for motive power as well as for light and heat.

[47] Crouch *v.* City of McKinney, (Tex.) 104 S. W. 518 (1907).

the power is expressly granted to own and maintain such a utility for any purpose. In one of the earliest cases and perhaps the leading case upon this subject, [48] so far as the utility of electricity is concerned, the court argued as follows:

> The corporation possessing, as it does, the power to generate and distribute through its limits, electricity for the lighting of its streets and other public places, we can see no good reason why it may not also, at the same time, furnish it to the inhabitants to light their residences and places of business. To do so, is in our opinion, a legitimate exercise of the police power for the preservation of property and health. It is averred in the complaint that the light which the city proposes to furnish for individual use is the incandescent light. Here again is a fact of which we are authorized to take judicial knowledge. A light thus produced is safer to property, and more conducive to health than the ordinary light. Produced by the heating of a filament of carbon to the point of incandescence in a vacuum, there is nothing to set property on fire, or to consume the oxygen in the surrounding air, and thus render it less capable of sustaining life and preserving health.

Implied power to furnish a utility service beyond the city limits

Still another aspect of the implied powers of a municipality in owning and operating public utilities is concerned with the power of the city to furnish service beyond its own boundaries. Normally the jurisdiction of a city in respect to all of its functions is confined within its own geographical limits. That the legislature may, and sometimes does, empower a city to exercise exterritorial jurisdiction is beyond question. So far as utilities are concerned perhaps the most notable

[48] Crawfordsville *v.* Braden, 130 Ind. 149 (1891).

instance of this was the grant to the city of Cincinnati of power to own and operate a steam railway which connected the city with points many miles away. This express grant of power was sustained by the Ohio supreme court.[49] But what of exterritorial powers by implication?

In a fairly early Michigan case it was held that under the power to "construct, repair, and preserve sewers" a city could by implication contract for the disposal of its sewage beyond the city limits. Such implication, however, the court thought "must arise from the existence of a state of facts which render it either actually necessary, or at least manifestly desirable." In the particular case under review such a state of facts was found to exist.[50] Cases may undoubtedly be found in which the implied power of a city to furnish an excess of service to extra-mural residents has been denied;[51] but the more widely accepted rule would seem to be to the contrary. This is founded upon the general notion that while a city may not by implication exercise its strictly governmental powers beyond its boundaries, it is, in owning and operating a utility, acting more nearly in a private or proprietary capacity, and that in consequence its powers should be "construed in accordance with the general rules that apply to private individuals and corporations."[52] On the other hand, a city may not by implication purchase a franchise in

[49] Walker *v.* City of Cincinnati, 21 O. St. 14 (1871).

[50] Coldwater *v.* Tucker, 36 Mich. 474 (1877).

[51] See, for example, City of Paris *v.* Sturgeon, (Tex.) 110 S. W. 459 (1908).

[52] See, for example, City of Henderson *v.* Young, 119 Ky. 224 (1904). See also on the same point Schneider *v.* Menasha, 118 Wis. 298 (1903).

another city or contract to furnish another city with a utility service.[53]

Implied power to engage in business of a collateral character

Finally must be mentioned those cases in which question has been raised concerning the competence of a city, without express authorization, to engage in some undertaking or business that is only collaterally related to a service which it is expressly empowered to perform. These cases are not numerous, but they are both interesting and important.

In two states the courts have been called upon to determine whether a city may by implication acquire and operate a rock quarry for the purpose of securing material for the maintenance of its streets. In Wisconsin the court found no difficulty in sustaining this competence as being implied in the power "to improve streets" and to "purchase such real estate as it is deemed reasonably necessary or convenient for the city's use." [54] In this case the property in question lay outside of the city limits, and most of the opinion was directed to upholding the view already mentioned that in the exercise of its so-called business functions a city may, without specific grant of power, control property outside of its boundaries, the city acting as an owner rather than as a government. In Virginia, on the other hand, the implied power of a city to acquire and operate a rock quarry, whether within or without the corporate limits,

[53] Dyer *v.* City of Newport, 123 Ky. 203 (1906); Farwell *v.* Seattle, 43 Wash. 141 (1906).

[54] Schneider *v.* Menasha, 118 Wis. 298 (1903).

has been more than once denied.[55] In this state the view was taken that a city cannot, in the absence of express authorization, exercise *any* function beyond its limits. In Michigan a city may not, unless specifically empowered, engage in the manufacture of bricks to be used for street paving.[56] Said the court in the brief opinion that was read:

> We agree with the opinion filed in the circuit court that the power to engage in the business of brick making, is not included in the powers expressly granted to the city, and that it is neither fairly implied in, nor incident to, such powers as are expressly granted, nor is it indispensable or even essential to the declared objects and purposes of the corporation. While the law permits municipal corporations to do those things which are necessary to accomplish the objects of their creation, under an implication of power . . . , the grant has not usually been held to go as far as to permit them to engage in the manufacture of articles necessary to their lawful enterprises, where they are in common use and are to be had in the open market.

Finally, it may be noted that in a Mississippi case in which the city was expressly granted the power of eminent domain to be exercised for certain specified purposes "and for any other purpose" it was held that this power could not be used to condemn land for a spur track leading to a power plant which the city was empowered to own. The city sought to construct this track in order to save expense in the transportation of coal.

It will be observed that in none of the cases just mentioned was there any attempt on the part of the

[55] Duncan *v.* City of Lynchburg, (Va.) 34 S. E. 964 (1900); Donable's Administrator *v.* Town of Harrisonburg, 104 Va. 533 (1905); Radford *v.* Clark, 113 Va. 199 (1912).

[56] Attorney General *v.* Common Council of Detroit, 150 Mich. 310 (1907).

city to go into a business involving the sale of products or service to private persons. Each of them involved a function that would eliminate certain purchases by the city from private persons; but that was the limit of their effect upon private business. One can see at a glance the extremes to which either one of the views expressed in these cases might lead. Every large city is a purchaser of a great variety of supplies. Any city that undertook to acquire the sources for, or to manufacture a considerable number of, the various commodities it required would indeed have a staggering problem on its hands. On the other hand, the extreme logic of the denial expressed in some of these cases would prohibit a city from mixing its own paints for public work, or from manufacturing its own asphalt. The truth of the matter seems to be that the city, like a private individual or private corporation, ought to be allowed to use its own judgment in such matters. It is a common practice for private persons engaged in this or that line of business to effect economies by purchasing sources of materials or by manufacturing incidental products needed for the particular business. On the whole, the decision of the Wisconsin court in sustaining the implied right of a city to own a rock quarry strikes with much force. The time has arrived, perhaps, when we should abandon the prevalent notion that the business judgment of a city is invariably either a poor judgment or a corrupt judgment.

In one or two interesting cases question has arisen as to the implied power of a city to go into the business of selling to private persons products or service of a character collateral to the business of operating a par-

ticular utility. Thus, in a Georgia case it was held that a city could not, as an incident to the operation of its water system, go into the plumbing business. The court regarded this as an "independent business enterprise or occupation such as is usually pursued by private individuals;" it was an affair "entirely unconnected with a proper administration of its [the city's] governmental duties."[57] In Michigan, however, it has recently been held that in connection with the operation of an electric plant a city may "do electric wiring . . . and furnish fixtures and other accessories essential and convenient in using electricity." [58] Emphasizing the fact that the management of an electric plant was a business enterprise rather than a governmental function, the court said:

> It may well be contended that furnishing to customers taking electricity the necessary devices or equipment to produce heat, power, or light from the current is naturally incidental to and an implied power connected with the business of operating an electric plant. It does not appear that the municipality in so doing is conducting the business by different methods or under other rules than those which are observed by and control private business corporations or private individuals in the operation of an electric plant.

The court attempted to distinguish between this case and the Georgia plumbing case on the ground that water is delivered to the consumer ready for use, while electric current that is delivered at the consumer's premises is useless "without further mediums and appliances." It may well be asked, however, whether wiring and electric fixtures are any more indispensable for rendering current practically available than are piping,

[57] Keen *v.* Mayor and Council of Waycross, 101 Ga. 588 (1897).
[58] Andrews *v.* City of South Haven, 187 Mich. 294 (1915).

and faucets and sinks and tubs for rendering water practically available. The fact is that the two cases appear to be quite irreconcilable, although it is to be remarked that in practice electric companies frequently supply wiring and fixtures while water companies seldom if ever carry on a plumbing business.

In the light of numerous modern cases in which the rule of strict construction of municipal powers has been applied with considerable severity, it is open to question whether it may be said that the rule is gradually being broken down. It is a difficult task to weaken the force of a long-standing rule of law. From the cases that have been under review, nevertheless, it would seem that important inroads are being made upon the rigidity with which the rule of strict construction has been applied. It is not to be expected that the courts will abandon this rule entirely and adopt a rule of loose construction somewhat similar to that applied in interpreting the powers of the Congress of the United States. It is not even to be expected that in the near future they will discontinue the reiteration of the usual canons of construction as formulated by Judge Dillon. It is only to be hoped that in the specific application of these canons they will in fact assume a reasonably liberal attitude. This, as we have seen, the courts may do if they care to do so. It would be highly desirable if they would return to the view that any doubt against the powers of a municipal corporation should be resolved, not necessarily against the corporation, but always in favor of the public, whether for or against the corporation.

CHAPTER III

EXPANDING THE POLICE POWER—SMOKE AND BILLBOARDS

It is very nearly impossible to define the term "police power" in phrases that are any less general than the term itself. For our purposes here, however, the concept of the term may be fairly described without great difficulty. On the one hand, our national and state constitutions, by clauses of both specific and general import, establish protection for the individual over against the government in a large but somewhat elastic sphere of liberty and of property rights. On the other hand, the very existence of the government, endowed with regulatory powers, clearly recognizes that the rights of the individual to his liberty and his property cannot and should not be absolute.

Some of the powers which we confer upon our governments are granted in express or clearly implied terms. The police power, as the term is commonly understood, is not in this category. It is a power which the government enjoys without specification. For this reason our national government, being a government of enumerated powers, enjoys no general police power.[1] Such power is vested in the states, for the governments of our

[1] Under specific powers the national government exercises certain powers assimilable to those which might be included within the term police power. The power to regulate commerce, for example, has been used for police purposes; but in such instances Congress is exercising not the police power but its power over commerce.

states, being governments not of enumerated but of residuary powers, enjoy all powers not denied to them by the federal constitution or their own constitutions. The powers of our state governments, then, may be regarded as constituting a zone that lies between the constitutionally protected rights of the individual on the one side, and unlimited governmental supremacy over the individual (outside of the sphere of national powers) on the other side. In this zone the uncharted police power of the state government occupies the most conspicuous place. Whatever governmental action may be justified under the police power is not regarded as trenching upon the constitutional rights of the individual; neither is it regarded as sustaining the notion that the powers of the government over the individual are unlimited. The police power, therefore, lies in, and constitutes one of the major parts of, this middle ground in which the government may act upon the individual by restriction or compulsion.

The common subjects of the police power

But what subjects of legislation are included within the range of the police power? In a general way these subjects may be separated into two groups—those relating to social affairs and those relating to economic affairs. In each of these groups a few large subjects are well settled as being within the police power. Thus, in the social group, it is universally recognized that the public peace or order, the public health, public morals, and public safety—each in itself offering a broad and by no means clearly marked field for governmental

regulation—are proper subjects for legislation under the police power. A law prohibiting the carrying of concealed weapons, or a law providing for the quarantine of persons afflicted with contagious diseases, or a law prohibiting indecent publications, or a law requiring fire escapes on designated classes of buildings clearly interferes with the liberty of individuals; but such laws are sustained as proper exercises of the police power in the interest respectively of the peace, the health, the morals, the safety of the public. These are unquestionably the primary subjects of control under the police power; and, on the whole, the courts are inclined to sanction a very wide legislative discretion with reference to such subjects. Thus, to cite only a single example, laws prohibiting the conduct of business and amusements on Sunday are commonly upheld, although such regulations cannot be constitutionally sustained upon religious grounds, have no especial relation to the preservation of the peace, safety, or even the morals of the community, and can be logically gathered under the protection of public health only if it be conceded that the legislature has complete power to regulate periods of labor and rest,[2] which is open to question.

[2] Professor Freund would sustain such legislation as a "protection of the good order and comfort of the community." *Police Power*, p. 169. But it can scarcely be argued that what constitutes "good order" varies with the day of the week, while the "comfort of the community" presents, to say the least, a somewhat vague concept, although the phrase is not infrequently used by the courts in general discussions of the police power. The truth appears to be that, notwithstanding constitutions to the contrary, legislation of this kind is in frank recognition of the fact that the Christian religion is the religion of the major portion of the people of the United States. Because of our constitutions, however, courts must of necessity find other grounds, whether reasonable or unreasonable.

In the group of police power subjects relating to economic affairs may be mentioned frauds and dishonesty, oppression, business affected with a public interest, and conservation of natural resources. Thus a law regulating weights and measures may be sustained as a protection to the public against fraud. A law prohibiting combinations in restraint of trade is a protection against economic oppression. A law regulating public utility rates or service is upheld because the business of furnishing utilities is affected with a peculiar public interest.[3] A law establishing a closed season for the shooting of game or the taking of fish is supported in the interest of protecting natural resources.

It is easy enough to indicate in this general way the broad social and economic subjects that are commonly regarded as being within the scope of the police power. But notwithstanding the obvious elasticity of each of these broadly named subjects, the courts have never been content to restrict the police power within the confines set by such an enumeration. In describing the police power generally, they have commonly enumerated only the social subjects—peace, order, health, morals, safety—and have omitted all specific reference to economic subjects. Almost invariably, however, certain very indefinite subjects have been included, such as the "general" or "public welfare," the "public comfort or convenience," and the "general prosperity" or the "general well-being" of the community. Indeed, the courts have deliberately, and, it would seem, wisely, left the police power practically undefined in scope.

[3] *Infra*, ch. VII.

Take, for example, as a single instance among many, the view expressed by Mr. Justice Harlan:[4]

> The learned counsel for the railway company seem to think that the adjudications relating to the police power of the state to protect the public health, the public morals and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals or the public safety. . . We cannot assent to the view expressed by counsel. We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. . . And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose.

It seems perfectly patent that such comprehensive phrases as "public welfare," "public convenience," "general prosperity," or "general well-being" are intangible and illusive. It is utterly impossible to example them in any satisfactory manner. As the learned justice remarks, "the circumstances of each case" and the reasonableness of the regulation must govern. It is of importance to note, nevertheless, that, however unlimited their definitions have been, the courts have not in point of fact sustained under the police power many laws regulating matters that lie wholly outside of the broadly designated social and economic subjects that have been mentioned. A few of the instances in which

[4] C. B. & Q. Railway Co. *v.* People *ex rel.* Drainage Commissioners, 200 U. S. 561 (1905) at p. 592.

they have done so will be referred to in a later connection.

The police power in relation to constitutional limitations

This broadly and vaguely defined police power is in perpetual opposition to the guaranties of personal liberty and private property rights as established by our constitutions. The courts are kept constantly engaged in marking at specific points the boundary line between the two. A complete boundary line has not been and will not be drawn. There are two general constitutional guaranties which are of principal importance in this connection—the guaranty of equal protection of the laws and the guaranty of due process of law. Each of these may be viewed as affording protection to private rights as against improper exercises of the police power under somewhat different circumstances.

Even when the legislature is acting upon one of those general subjects of control that are universally recognized to be within the scope of the police power, the competence of the legislature is not without constitutional limitations in behalf of private rights; for no person within the jurisdiction of a state may be denied the equal protection of the laws. The problem presented by this guaranty is indeed complex; but, broadly speaking, this means that no person or class of persons may be singled out for regulation from among other persons in equality or similarity of circumstance. A law regulating hours of labor may be sustained as a proper exercise of the police power in the interests of the public health. If such a law is made applicable

only to children, it may not be successfully contended that this is a denial of equal protection of the laws; for children constitute a reasonable class—a class that bears a definite relation to the purpose of the law. But if such a law were made applicable to adult laborers in one industry and inapplicable to those in another industry of practically the same character, it would be void on the ground of discrimination; it would deny equal protection of the laws. Individual liberty and property rights are not, therefore, wholly at the mercy of the legislature, even when it seeks to regulate some subject that is admittedly within the scope of the public power.

When the legislature attempts to go beyond the police power—to regulate some matter which the courts refuse to regard as being within its proper scope—it is perhaps needless to say that constitutional protection may also be successfully invoked to defeat such legislation. In instances of this kind there is available to the aggrieved person not only the guaranty of equal protection of the laws but also the clause which declares that no state shall deprive any person of life, liberty, or property without due process of law. Indeed, in many of the cases upon this subject the courts fail to draw any clear distinction between these two guaranties. The regulation of railway rates is a proper exercise of the police power because the railway business is affected with a peculiar public interest; but if rates are reduced to a point at which a reasonable income cannot be earned, the railway company is not only denied the equal protection of the laws, which other persons enjoy in being permitted to earn reasonable incomes on their

investments, but is also deprived of property without due process of law by reason of the confiscatory character of the rates.

The police power distinguished from taxation and eminent domain

The police power must be distinguished from the taxing power and from the power of eminent domain. These latter powers always involve the taking of private property. For property that is taken in the form of taxes the individual usually receives no direct compensation. For property taken under the power of eminent domain he must be paid just compensation. Each of these powers may, however, be used for police purposes. Most taxes are imposed solely for revenue purposes; but a high liquor license tax, for example, may be imposed primarily for purposes of regulation. In other words, it may be a police measure in the interest of health and morals. Even so, the levying of such a tax is a manifestation of the taxing power rather than the police power. The power of eminent domain is used primarily to secure real property for direct public use; but this power may also be used for police purposes. Thus, when a railway company is required to make a change of grade at a street crossing, in order to secure the public safety, and damages are allowed as compensation to the company, this is manifestly an exercise of the power of eminent domain for police purposes. Indeed, it is probably true to say that the power of eminent domain *may* be used in any instance in which the police power might be used to the impairment of property rights. But the reverse of this is not

true, for certain important distinctions may be drawn between these two powers.

In the first place, property rights may be invaded under the police power only when the free exercise of such rights has become *detrimental* to the public; and while the power of eminent domain *may* be used in like circumstances it is nevertheless commonly used only when the property, regardless of the effect or character of its private use, is needed for actual public use. For instance, a hospital which constituted a nuisance might be abated under the police power or might be condemned under the power of eminent domain, but property for a hospital, even though its use be in the interest of the public health, could not be acquired under the police power, but only by eminent domain. In the second place, regulation under the police power ordinarily imposes only a comparatively slight burden upon private property, leaving its substantial value unimpaired.[5] Under eminent domain, however, it is common either to take property entirely or to take the major portion of its beneficial uses, leaving, if anything, little more than the naked legal title.[6] Property owners may be required in the interest of public health to leave a portion of a lot unoccupied by a building; but this portion could be taken for street purposes only by eminent domain. In the third place, while neither of

[5] This is not always the case. Property which is of no large value and which can normally be used only for a purpose forbidden by the law may be sequestrated and destroyed. So also property that imminently endangers the safety of the public (such as an unstable wall or building, or a building in the path of a fire) may be summarily destroyed. Again, the entire value of improvements on real property may be destroyed by regulations which require the removal of an offensive business to a new site.

[6] This is not the case when eminent domain is used for police purposes.

these powers may be used for other than a public purpose, it is perhaps natural that courts should regard the purposes for which property may be taken upon the payment of compensation as more inclusive than the purposes for which property may be interfered with without such compensation. It may be, for example, that eminent domain may be used where the purpose in view is purely æsthetic, while the police power might not be so used. As we shall see, however, the law upon this subject is not as yet fully settled.

So much for the general setting of the police power under our system of jurisprudence.

It has been said that the police power belongs to the states. Such power or parts of it may, however, be delegated to cities by the state legislature. In every charter enumeration of municipal powers there are slices of the general police power of the state. Although a considerable number of cases may be found in which the exercise of this or that municipal power has been referred to the "general police power" of the city, it is probably correct to say that as a rule cities are regarded as possessing only specifically delegated portions of such power.[7] However, we are here interested not so much in the extent to which the police power is exercised in cities directly by the legislature instead of by the corporate authorities but rather in the constitutional limitations that are imposed upon its exercise by either of these agencies of government. The governing principles are the same in either case. Let us consider,

[7] In California (Art. XI, sec. 11), Washington (Art. XI, sec. 11), and Ohio (Art. XVIII, sec. 3) a general local police power is delegated to all cities by constitutional provision.

then, the status of the law in respect to the exercise of the police power in cities over certain specific matters of modern interest and importance.

The smoke nuisance

For twenty-five years or more cities in the United States have been wrestling more or less abortively with the problem of smoke prevention. The problem has its practical, its scientific, and its legal aspects. On the one hand, it is manifest that the very foundations of modern civilization rest upon the consumption of fuel; the very existence of cities is predicated upon it. On the other hand, everybody recognizes that the great quantity of smoke that shrouds whole cities or sections of cities in an almost unbroken twilight pall is, to put it mildly and indefinitely, highly objectionable. One learned judge has somewhat over-vividly described smoke as something which "stifles the breath, produces nausea and headache, drives children from their playgrounds, and men from their gardens, prevents the drying of clothes and ventilation of houses, darkens the sunlight, and converts pleasant residences into prisons in dog days, and defiles carpets, curtains, and dinner-plates with deposits of soot and dirt."[8] One need scarcely subscribe to the whole of this lurid picture of a city population scurrying to cover, as it were, in the face of a dread pestilence. Indeed, a distinguished scientist,[9] who argues that the solids in smoke, which are often invisible, are really its "most objectionable prop-

[8] Quoted in People *v.* Horton, 41 N. Y. Misc. 309 (1903).

[9] Goss (Dean of the College of Engineering, University of Illinois), *A Problem of the Modern City*, in *Proceedings of the Engineers' Society of Western Pennsylvania*, March, 1915, 13: 2:229.

erties," has recently declared that "we really know very little about smoke, and much less concerning means whereby it may be suppressed. . . . All existing ordinances designed to abate smoke are limited to a consideration of a single property of smoke, namely, its visibility. 'Black smoke', or 'dense brown smoke', or 'dense smoke' are among the things which are prohibited. . . . But the conception is imperfect and any procedure based thereon will fail to give the full measure of relief desired."

Progress has, however, been made in the scientific study of the properties and effects of smoke and of methods of abatement, notably by the researches of the Mellon Institute of Industrial Research and School of Specific Industries at Pittsburgh. And we may confidently look for more and more accurate information upon this subject as time goes on. Meantime, cities have not waited; and the courts have been called upon to consider the validity of their regulatory ordinances.

A consideration of the powers of a city to abate smoke takes us into the somewhat complex subject of nuisances. There is no question that where a person can prove that he is personally suffering from smoke caused by the action of another he may ordinarily secure an injunction to protect himself. So, also, where a city is empowered to abate nuisances—and most cities are so empowered—the authorities of the city may take action in such circumstances looking to the protection of the individual aggrieved. In instances of this kind the smoke would be regarded as a *private* nuisance—that is, "one which affects a private right not common to the public, or which causes special injury to the person or

property of a single person or a definite number of persons."[10] But a private nuisance can be abated only upon proof of direct and specific injury; and it is obvious that the smoke problem in most cities cannot be dealt with as an interminable series of incidents in which proof of specific injury must be shown in each case.

A *public* nuisance, on the other hand, is "one which affects at the same time an entire community or neighborhood or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." [11] Such a nuisance may be prohibited by a law or ordinance which imposes a penalty; and the only proof that is necessary for conviction is proof of the commission of the unlawful act. It is unnecessary to show any specific injury to person or property. The term "public nuisance" is often used interchangeably with the term "nuisance *per se*," that is, one which "cannot be so conducted or maintained as to be lawfully carried on or permitted to exist."[12] It is only as a public nuisance that smoke as a general municipal problem may be adequately dealt with, if at all.[13] Some of the laws and ordinances dealing with this subject, in apparent mitigation of extreme prohibition, have been so qualified that they seem to

[10] Joyce on *Nuisances*, sec. 8.

[11] *Ibid.*, sec. 7; quoted from California Civil Code, sec. 3480, as an example of statutory definition.

[12] *Ibid.*, sec. 12. If there is a valid distinction between these terms it is by no means consistently applied by the courts.

[13] "The difficulty of proving damages in each case practically nullified the ordinance." So declared the Smoke Abatement Committee of the Civic League of St. Louis, in commenting upon the results of the decision of St. Louis *v.* Heitzeberg Packing and Provision Co., 141 Mo. 375 (1897). *The Smoke Nuisance*, 1906, p. 8.

put the smoke nuisance in a half-way position between a private and a public nuisance. Thus the sanitary code of the city of New York imposes a penalty for the emission of smoke "to the detriment or annoyance of any person or persons;" and it has been held that evidence must be introduced to show that the emission of smoke actually caused personal detriment and annoyance.[14] The smoke must be "in fact a nuisance," said the court, "not perhaps within the full scope of the common law nuisances, but a nuisance which, by annoying one or more persons, shall be constructively a public nuisance." Obviously under such circumstances the difficulty of specific proof places smoke more nearly in the category of private than of public nuisances.[15]

From the viewpoint of the law, two principal legal difficulties have arisen in connection with ordinances declaring smoke to be an unqualified public nuisance.[16] One of these has concerned the competence of the city to enact an ordinance of this kind where its charter has not granted such power in express terms. Practically every city is endowed with power to abate nuisances; but this does not of necessity vest the city with power to define or declare what shall constitute a *public*

[14] People *v.* Sturgis, 121 N. Y. App. Div. 407 (1907).

[15] See also Erie R. Co. *v.* Mayor etc. of Jersey City, 84 Atl. 697 (1912), where the ordinance under review prohibited dense smoke which "contains soot or other substance in sufficient quantity to cause injury to health or damage to property;" and People *v.* Lewis, 86 Mich. 273 (1891), where a similar qualifying clause was embodied in the ordinance.

[16] It seems unnecessary to discuss the question of a denial of equal protection of the laws which has arisen in some cases by reason of exemptions established by the regulatory ordinance. See, for example, City of Brooklyn *v.* Nassau El. R. R. Co., 44 N. Y. App. Div. 462 (1899); People *v.* Lewis, 86 Mich. 273 (1891); Moses *v.* United States, 16 App. D. C., 428 (1900).

nuisance. It has been held, therefore, that a city may not prohibit generally the emission of dense smoke unless it is expressly empowered to declare what shall be a nuisance.[17] But in New York an ordinance of this kind has been sustained under the general "power to enact sanitary ordinances having the force of law."[18] Indeed, there is probably only one case in which the city enjoying the power to "declare," as well as to "prevent and abate," nuisances has been denied this competence.[19]

Of much greater importance, however, in the consideration of the validity of smoke prevention ordinances is the question as to whether such ordinances are within the scope of the police power. It must be borne in mind, in the first place, that the consumption of fuel is absolutely indispensable. Even though it were proved that smoke is detrimental to the public health and injurious to property, it is inconceivable that the courts would allow any regulation to stand which in effect operated to prohibit fuel consumption. In the second place, the regulation of smoke must be gathered under some appropriate subject of police power control.

[17] City of St. Paul *v.* Gilfillan, 36 Minn. 298 (1886), distinguishing on this ground Harmon *v.* City of Chicago, 110 Ill. 400 (1884). See also Glucose Refining Co. *v.* City of Chicago, 138 Fed. 209 (1905). In City of St. Paul *v.* Johnson, 69 Minn. 184 (1897), and City of St. Paul *v.* Haugbro, 93 Minn. 59 (1904), the question of the city's power to declare dense smoke a public nuisance was not discussed.

[18] People *v.* Horton, 41 N. Y. Misc. 309 (1903); Department of Health of the City of New York *v.* Ebling Brewing Co., 78 N. Y. Supp. 11 (1902).

[19] St. Louis *v.* Heitzeberg Packing & Provision Co., 141 Mo. 375 (1897). Thereafter the Missouri legislature enacted a law applicable to St. Louis which declared dense smoke to be a public nuisance. This law was sustained in State *v.* Tower, 185 Mo. 79 (1904); but the Heitzeberg case was apparently not overruled on the point respecting the power of the city.

In a few instances the courts have been greatly influenced by the argument that consumers have found it physically difficult, if not impossible, to comply with the regulations imposed. Thus, in Missouri an ordinance was declared "wholly unreasonable" which essayed "in advance of any known device for preventing it [dense black or very thick grey smoke] to punish all who produce it in any degree whatever."[20] So in Pennsylvania the enforcement of an ordinance that imposed a fine for permitting "smoke from bituminous coal to be emitted . . . for over three minutes" was held to be "impracticable, not to say impossible."[21] In New Jersey an ordinance which prohibited the emission of dense smoke was sustained in its application to factories and private establishments;[22] but a similar ordinance was declared to be unreasonable in its application to a railway and "in derogation of the charter rights of the road."[23] The court did not say that compliance with the ordinance was impossible, but this is probably the inference to be drawn from the declaration that a railway company might "make such noise, smoke, and smells as are *reasonably unavoidable* in the careful and proper conduct of its business, even if some injury to health and some damage to property be caused there-

[20] St. Louis *v.* Heitzeberg Packing & Provision Co., 141 Mo. 375 (1897). The ordinance was also held to be *ultra vires*. The state law on this subject which was subsequently upheld in State *v.* Tower, *supra*, declared that "if there were no known practical devices or appliances by which dense smoke so generated could be prevented," the owners and managers of buildings "should not be punished therefor."

[21] Pittsburgh *v.* Keech Co., 21 Penn. Sup. 548 (1902).

[22] Atlantic City *v.* France, 75 N. J. L. 910 (1907).

[23] Erie R. Co. *v.* Mayor etc. of Jersey City, 84 Atl. 697 (1912); Pennsylvania R. Co. *v.* Mayor etc. of Jersey City, 87 Atl. 465 (1913).

by." In a recent Michigan case it was held that an ordinance prohibiting dense black or grey smoke could not be enforced in its application to steamboats where the "evidence of expert marine engineers showed that there was no known appliance which could be used upon marine boilers to prevent the emission of smoke" so long as "the consumption of bituminous coal is permitted."[24] The court did not discuss why the ordinance could not have been held to require in effect that hard coal be used. This has, in fact, been the effect of many smoke-prevention regulations; and in New York a law which expressly prohibited the burning of soft or bituminous coal within four miles of the city (now borough) hall in Brooklyn was sustained.[25] In Illinois, where the courts have been extremely liberal in sustaining smoke-prevention ordinances, it has, nevertheless, been held that evidence of the fact that a heating plant "was of the most improved type and that the owner had done all that skill could devise to prevent smoke," should be admitted in mitigation of the penalty although not for the purpose of defeating recovery on the ground that the ordinance was impossible of enforcement.[26]

While certain cases may be cited, therefore, in support of the view that smoke may not be prohibited if the prohibition is impracticable, there are a number of cases which, with or without express declaration, proceed upon the assumption that the emission of dense

[24] People *v.* Detroit etc. Co., (Mich.) 153 N. W. 799 (1915). This decision was not to be regarded as a bar to future action under the ordinance if practical appliances should be invented.

[25] City of Brooklyn *v.* Nassau El. R. R. Co., 44 N. Y. App. Div. 462 (1899); reaffirmed in City of New York *v.* Johns-Manville Co., 89 N. Y. App. Div. 449 (1903).

[26] City of Chicago *v.* Knobel, 232 Ill. 112 (1908).

smoke may be prevented by mechanical devices for consuming, burning, or washing the smoke, by the use of hard instead of soft coal, and by proper stoking. The court of appeals of the District of Columbia has expressly averred that the burden of showing the impossibility of compliance and, therefore, the unreasonableness of the prohibition against smoke, rests upon him who violates the regulation.[27]

That dense smoke may be declared to be a public nuisance and as such may be prohibited has generally been sustained as a valid exercise of the police power. It must be admitted, nevertheless, that the courts have more frequently than not proceeded upon popular assumptions rather than scientific facts. It has been declared that smoke is "detrimental to certain classes of property and business" and is a "personal annoyance to the public at large;" [28] that it is "most objectionable and offensive;" [29] that it is "well within the police power of the state" because it is "detrimental to the public welfare;" [30] that it lies "on the border line of a public nuisance." [31] In a case recently decided by the United States Supreme Court it was not even thought necessary to discuss the effects of smoke or the public purpose to be accomplished by its prohibition. The court simply declared:[32]

[27] Bradley *v.* District of Columbia, 20 App. D.C. 169 (1902); reaffirming Moses *v.* United States, 16 App. D. C. 428 (1900). See also Sinclair *v.* District of Columbia, 20 App. D. C. 336 (1902).

[28] Harmon *v.* City of Chicago, 110 Ill. 400 (1884).

[29] Department of Health of the City of New York *v.* Ebling Brewing Co., 78 N. Y. Supp. 11 (1902).

[30] City of Brooklyn *v.* Nassau El. R. R. Co., 44 N. Y. App. Div. 462 (1899).

[31] Bowers *v.* City of Indianapolis, (Ind.) 81 N. E. 1097 (1907).

[32] Northwestern Laundry *v.* Des Moines, 239 U.S. 486 (1915).

So far as the Federal Constitution is concerned, we have no doubt the state may itself, or through authorized municipalities, declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to large expense in complying with the terms of the law or ordinance.

Since the scope of the police power of the states is largely a federal question, this declaration, however unsupported by argument, must be taken as settling the proposition that a prohibition upon the emission of dense smoke in cities is a proper exercise of the police power.

It would be interesting to analyze and compare the smoke prevention laws and ordinances, which are now found in most cities,[33] and to discuss some of the difficult administrative problems that have arisen in connection with their enforcement. Suffice it to say that while considerable progress has been made, the smoke problem has by no means been completely solved in any city.

Billboard regulations

In the opinion of many persons one of the most objectionable features of the modern American city is the unsightliness of our increasingly flamboyant billboards. "Modern civic art," says a recent commentator, "coming to the advertising problem, should feel not hostility,

[33] See Flagg, *City Smoke Ordinances and Smoke Abatement*, Bulletin No. 49, United States Bureau of Mines, 1912.

but the thrill of opportunity."[34] It seems needless to say, however, that it requires unusual optimism to preserve one's thrill of opportunity if the rights of private property are to be regarded as standing irrevocably in the way of transforming that opportunity into realization.

Numerous cities have attempted to deal with one or more aspects of the billboard problem. It may be put down at the outset that, although courts have sometimes in the course of their opinions referred to the unsightliness of billboards, no court has as yet sustained a billboard ordinance predicated solely upon æsthetic grounds. On the contrary, every such ordinance has been declared invalid. Thus, an ordinance prohibiting generally the posting of advertisements upon fences enclosing private property or prohibiting the erection of signs upon private property has been held void in New York[35] and New Jersey.[36] So a regulation of the Boston park commissioners prohibiting the maintenance of business signs so near a parkway as to be plainly visible to the naked eye of persons in the parkway was held by the supreme court of Massachusetts to be a taking of private property for public use without compensation.[37] Even a law prohibiting advertisements upon the stately palisades of the Hudson River was recently declared by the supreme court of New Jersey to be an invalid invasion of private property rights.[38] More than this, the courts have declared void a number of regulations which aimed at the limitation or suppression of billboards

[34] Robinson, *Modern Civic Art*, p. 152.
[35] People *v.* Green, 85 N. Y. App. Div. 400 (1903).
[36] Bill Posting Co. *v.* Atlantic City, 71 N. J. L. 72 (1904).
[37] Commonwealth *v.* Boston Advertising Co., 188 Mass. 348 (1905).
[38] State *v.* Lamb, (N. J.) 98 Atl. 459 (1916).

upon the ground that æsthetic considerations were apparent even though they were not expressly put forward.[39] Indeed, numerous courts have unqualifiedly declared that legislation for æsthetic purposes is wholly beyond the scope of the police power. To quote from a single opinion among many, the supreme court of California has expressed the following views upon this subject:[40]

Except for the limited exemption conferred by Section 3, the effect of the ordinance is to absolutely prohibit the erection or maintenance of billboards for advertising purposes. There is no attempt to restrict the operation of the enactment to billboards that may be insecure or otherwise dangerous, or to advertising that may be indecent. The town trustees have undertaken to make criminal the maintenance of any billboard, however securely it may be built, and however unobjectionable may be the advertising matter displayed upon it. Such prohibition, involving a very substantial interference with the rights of property, can be justified, if at all, only to the extent that the subject-matter of the legislation is embraced within the police power of the state. Bearing in mind that the ordinance does not purport to have any relation to the protection of passers-by from injury by reason of unsafe structures, to the diminution of the hazard of fire, or to the prevention of immoral displays, we find that the one ground upon which the town council may be thought to have acted is that the appearance of billboards is, or may be, offensive to the sight of persons of refined taste. That the promotion of æsthetic or artistic considerations is a proper object of governmental care will probably not be disputed. But, so far as we are advised, it has never been held that these considerations alone

[39] City of Passaic *v.* Paterson Bill Posting Co., 72 N. J. L. 285 (1905); Varney & Green *v.* Williams, 155 Cal. 318 (1909); Bryan *v.* City of Chester, 212 Pa. 259 (1905); State *v.* Whitlock, 149 N. C. 542 (1908); Crawford *v.* City of Topeka, 51 Kan. 756 (1893); City of Chicago *v.* Gunning System, 214 Ill. 628 (1905); People *ex rel.* Wineburgh *v.* Murphy, 195 N. Y. 126 (1909); State *v.* Lamb, (N. J.) 98 Atl. 459 (1916); Haller Sign Works *v.* Training School, 249 Ill. 436 (1911).

[40] Varney & Green *v.* Williams, 155 Cal. 318 (1909).

will justify, as an exercise of the police power, a radical restriction of the right of an owner of property to use his property in an ordinary and beneficial way. Such restriction is, if not a taking, *pro tanto* of the property, a damaging thereof, for which, under Article I, Section 14, Constitution, the owner is entitled to compensation.

It goes without saying that billboards may in the interest of public morals be prohibited from carrying indecent or obscene representations; and that they may be regulated as to their location and construction in the interest of the public safety. However, in the earlier cases dealing with such regulations the courts were earnest to see that the requirements imposed had a very definite relation to such public purposes. Thus in Kansas an ordinance which required that every billboard and fence used for advertising purposes should, if it were ten feet in height, be erected fifteen feet back of the street line, was held void. "Regulation may be made," said the court, "with reference to the manner of construction so as to insure safety, but the prohibition of the erection of structures upon the lot lines, however safe they might be, would be an unwarranted invasion of private rights."[41] The same conclusion was reached by the New Jersey[42] and the North Carolina[43] courts in cases involving the validity of ordinances that prohibited billboards within ten feet of the street line regardless of the stability of their construction. So, in Colorado, a Denver ordinance was held invalid which limited billboards to twenty-five feet in length and eight feet in height, and required a setback of ten feet from the street line and the consent of adjoining lot owners

[41] Crawford *v.* City of Topeka, 51 Kan. 756 (1893).
[42] City of Passaic *v.* Paterson Bill Posting Co., 72 N. J. L. 285 (1905).
[43] State *v.* Whitlock, 149 N. C. 542 (1908).

and of residents on the opposite side of the street.[44] The first case on this subject in New York involved the validity of an ordinance of the city of Rochester which prohibited the erection of a billboard exceeding six feet in height unless by express permission of the common council. This ordinance, which did not absolutely prohibit billboards of greater height, was upheld.[45] But in a later case the New York court of appeals refused to sustain an ordinance of the city of New York which limited to nine feet the height of so-called "sky-signs" erected over or above buildings or walls.[46] In the view of the court this limitation bore no reasonable relation to the safety of the public. The Rochester case was distinguished, apparently on the ground that the requirement of a permit from the council for a billboard more than six feet high was merely a provision in the interest of public safety.

In 1911 was decided the very important case of the St. Louis Gunning Advertising Company *v.* City of St. Louis,[47] which may doubtless be said to have marked a turning point in the attitude of the courts toward billboard regulation. The ordinance in question limited the height of billboards to fourteen feet and their maximum area to 500 square feet, and required that they should be erected fifteen feet back of the street line, that their ends should approach not nearer than six feet to any

[44] Curran Bill Posting & Distributing Co. *v.* City of Denver, 47 Col. 221 (1910).

[45] City of Rochester *v.* West, 164 N. Y. 510 (1900). A similar Buffalo ordinance was sustained in Gunning System *v.* City of Buffalo, 75 N. Y. App. Div. 31 (1902), and Whitmier *v.* City of Buffalo, 118 Fed. 773 (1902). See also People *ex rel.* Standard Bill Posting Co. *v.* Hastings, 207 N. Y. 763 (1912), sustaining a similar ordinance of Newburgh.

[46] People *ex rel.* Wineburgh *v.* Murphy, 195 N. Y. 126 (1909).

[47] 235 Mo. 99 (1911).

building or side line of the lot, nor nearer than two feet to any other billboard, and that there should be a clearance of four feet between their lower edge and the ground. It is manifest that these restrictions were somewhat severe; but the ordinance was sustained in its entirety, and a number of new grounds were assigned for including such a regulation within the scope of the police power. It was pointed out that in addition to the dangers to the public safety due to unstable construction, billboards offered hiding places and retreats for criminals and all classes of miscreants. They increased fire hazards because of the collection of inflammable rubbish behind them, and they impeded the work of firemen in extinguishing fires. The public morals of the community were affected not only by the character of the posters but also by the amount of immorality that was carried on behind them. The public health was also jeopardized by the kind and amount of filth that was deposited in the rear of billboards. On the ground of morals and health, therefore, as well as public safety, the ordinance under review was sustained in an elaborate opinion in which the previous cases upon the subject were exhaustively analyzed.

It may be freely admitted that the picture of billboard evils was not greatly overdrawn in the opinion that was handed down, and that the requirement of an opening at the side line and a four-foot space between the ground and the lower edge of such a structure was wholly reasonable. It is, nevertheless, difficult to see how these evils were in any wise affected by the somewhat onerous limitations upon the height and area of billboards or by the requirements in respect to the dis-

tance back of the street line. Surely it must be conceded that an entirely safe structure of greater height and area than that allowed by the ordinance could be erected upon the street line, and that the public health and morality would not be advanced by any of these three requirements. One can scarcely escape the conclusion that the court, being convinced of the general objectionableness of these monstrosities, and being at the same time unwilling to declare unreservedly that the police power might be used for æsthetic purposes, was, nevertheless, ready to sustain the ordinance without too close an analysis. Indeed, the learned judge expressed the "individual opinion," although the case was not decided on so broad a ground, "that this class of advertising as now conducted is not only subject to control and regulation by the police power of the state, but that it might be entirely suppressed by statute, and that, too, without offending against either the state or federal constitution."

Prior to the decision of this St. Louis case, an absolute limitation upon the height of billboards—and that, a limitation to six feet—had been sustained in only one important case.[48] Since that date, however, the decision in the St. Louis case has been reaffirmed in Missouri,[49] and somewhat similar ordinances have been upheld in North Carolina,[50] Texas,[51] Rhode

[48] *In re* Wilshire, 103 Fed. 620 (1900).

[49] Kansas City Gunning Advertising Co. *v.* Kansas City, 240 Mo. 659 1912); limiting height to twelve feet, requiring a twelve-foot setback, a two-foot clearance, a three-foot opening at any wall or fence, and a permit.

[50] State *v.* Staples, 157 N. C. 637 (1911); requiring billboards to have a clearance of twenty-four inches above the ground.

[51] *Ex parte* Savage, 63 Tex. 285 (1911); limiting height to twelve feet, and requiring a three-foot clearance and a setback of five feet.

Island,[52] and Wisconsin.[53] It remained, however, for the supreme court of Illinois to permit the carrying of billboard regulation one step further by a decision handed down in December, 1914.[54] This case involved the validity of a provision in an ordinance of the city of Chicago which prohibited the erection of billboards "in any block or any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the consent, in writing, of the owners or duly authorized agents of said owners owning a majority of the frontage of the property, on both sides of the street in the block." This provision, of course, placed in the hands of property owners the absolute power to defeat the erection of a billboard in a block given over primarily to residences.

A very similar ordinance, which prohibited the erection of billboards along any boulevard or pleasure drive, or street in which three-fourths of the buildings were residences, without the consent of three-fourths of the residents and property owners in the block in which the board was to be erected, had previously been declared

[52] Horton *v.* Old Colony Bill Posting Co., (R. I.) 90 Atl. 822 (1914), limiting "sky signs" to nine and one-half feet in height (eleven and one-half if on supports), twenty feet in length, with open spaces at the ends; and limiting ground signs to the same height and to thirty-six feet in length, and requiring a setback, under certain conditions of construction, equal to the height of boards over six feet high, and a two-foot opening between billboards.

[53] Cream City Bill Posting Co. *v.* City of Milwaukee, 158 Wis. 86 (1914); requiring a clear space at the ends of all roof and coping signs (for firemen), and for ground signs a clearance of not less than three nor more than ten feet, construction of incombustible material within the city fire limits, and strength to withstand wind pressure of forty pounds. This ordinance was sustained even as to its retroactive application.

[54] Thomas Cusack Co. *v.* City of Chicago, (Ill.) 108 N. E. 340 (1914).

void by the Illinois court.[55] "The purpose," said the court, "seems to be mainly sentimental, and to prevent sights which may be offensive to the æsthetic sensibilities of certain individuals." An exercise of the police power for such a purpose could not be sustained. So also, and for the same reason, a statute which unconditionally prohibited the erection of signs for advertising purposes within five hundred feet of any park or boulevard had been invalidated by the same court.[56] But the above-mentioned provision of the latest ordinance on this subject was upheld, although the previous cases were not overruled but "distinguished". The court argued that since residence districts are "not so well protected with fire extinguishing apparatus" and are "not afforded as full police protection as other districts," and since billboards "increase the hazards of fire" and offer "protection to disorderly and lawbreaking persons," regulations peculiarly applicable to residence districts were justifiable. Reliance was also placed, as in the St. Louis case, upon the relation of billboards to public health and to public morals. As to the requirement of the consent of the property owners the court said that "in respect to occupation and structures, the location and maintenance of which are subject to regulation under the police power of the municipality, a requirement of frontage consents of property owners, within reasonable limits, is a proper mode of exercising the power of regulation." It is manifest, however, that upon the line of argument pursued by the court an absolute prohibition of billboards in residential districts

[55] City of Chicago *v.* Gunning System, 214 Ill. 628 (1905).
[56] Haller Sign Works *v.* Training School, 249 Ill. 436 (1911).

could be sustained. This permit to erect with the property owners' consent was merely a concession in mitigation of the complete prohibition that was possible under the police power.

In this case the court carefully avoided resting upon æsthetic consideration. It is submitted, nevertheless, that every one of the purposes mentioned by the court as being within the purview of the provision in question could have been accomplished by regulation short of prohibition, with or without the consent of property owners. The requirement that billboards be constructed of fireproof materials, without obstructive supports, and with sufficient clearance above the ground to prevent the harboring of lawbreakers and immoral persons, or the collection of inflammable rubbish or filth would have accomplished every specific purpose mentioned by the court. Again, therefore, it must be concluded that the court was actually influenced by considerations broader than those that were actually put forward.

The decision in this Illinois case was affirmed by the United States Supreme Court upon grounds even broader than those advanced by the supreme court of Illinois.[57] Referring to the evidence in respect to insufficient fire and police protection in residence districts, which the Illinois court held to have been erroneously excluded at the trial, the supreme court declared without reserve:

> Neglecting the testimony which was excluded by the trial court, there remains sufficient to convincingly show the propriety of putting billboards, as distinguished from buildings and fences,

[57] Thomas Cusack Co. *v.* City of Chicago, 242 U. S. 526 (1917).

in a class by themselves (St. Louis Gunning Advertising Co. *v.* St. Louis, 235 Mo. 99, 137 S. W. 929), and to justify the prohibition against their erection in residence districts of a city in the interest of the safety, morality, health, and decency of the community.

The court evidently did not think it necessary to discuss whether these several interests could or could not be protected by regulation short of prohibition. In respect to the consent of property owners the court went on:

The claim is palpably frivolous that the validity of the ordinance is impaired by the provision that such billboards may be erected in such districts as are described, if the consent in writing is obtained of the owners of a majority of the frontage on both sides of the street in any block in which such billboard is to be erected. The plaintiff in error cannot be injured, but obviously may be benefited, by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property. Tyler *v.* Judges of Ct. of Registration, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; Plymouth Coal Co. *v.* Pennsylvania, 232 U. S. 531, 58 L. ed. 713, 34 Sup. Ct. Rep. 359. To this we may add that such a reference to a neighborhood of the propriety of having carried on within it trades or occupations which are properly the subject of regulation in the exercise of the police power is not uncommon in laws which have been sustained against every possible claim of unconstitutionality, such as the right to maintain saloons (Swift *v.* People, 162 Ill. 534, 33 L. R. A. 470, 44 N. E. 528), and as to the location of garages (People *ex rel.* Busching *v.* Ericsson, 263 Ill. 368, L. R. A. 1915 D, 607, 105 N. E. 315, Ann. Cas. 1915 C., 183). Such treatment is plainly applicable to offensive structures.[58]

[58] The case was distinguished from Eubank *v.* City of Richmond, 226 U. S. 137 (1912), on the ground that in that case the ordinance permitted

The *judgments* reached in these recent cases are, without doubt, eminently wise and proper. They give high hope for the future possibilities of sensible control over ill-placed and garishly offensive billboards. At the same time, there may be cause for regret that it has seemed necessary to permit the partial suppression of billboards by more or less specious indirection—by regulations that are manifestly largely in the nature of subterfuges. This brings us to consider a few of the suggestions that have been put forward as substantial grounds upon which billboards might be strictly regulated or suppressed. It has been pointedly said that since offensive noises and odors may be restrained under the police power, thus protecting the nose and the ear, a similar protection to the eye would only carry a recognized principle to further application.[59] There is, perhaps, considerable force in this analogy. It should be noted, however, that noisy and odoriferous establishments, where they are not regarded as merely private nuisances, are prohibited as public nuisances primarily as to their location, and that the essence of their value does not ordinarily depend upon a particular site. Moreover, the offensive noise or odor is a collateral incident rather than a prime purpose. In the case of billboards, on the other hand, value arises essentially from location; the meeting of the eye, whether offensive or not, is not an incident but the whole purpose. A prohibition in either case destroys an element of prop-

two-thirds of the lot owners to *impose* restrictions in the nature of a building line upon other property owners in this block, while this ordinance "permits one-half of the lot owners to *remove* a restriction [which might have been made absolute] from the other property owners." *Infra*, 111-113.

[59] Freund, *Police Power*, p. 166; 20 *Harvard Law Review*, 35.

erty value; but in the case of billboards it also destroys a business.[60]

Another theory that has been offered is that land is valuable for building purposes, not because of anything inherent in the land, but because of its "projection value" into the street and upon the land of other persons. Since the government is competent to control the uses of the streets and to prevent trespass upon private property, it is urged that the government can upon the same ground control this "projection value"—that it can, in other words, prohibit a landowner from "projecting" the sight of an advertisement into the streets or upon others' property.[61] Of course the logic of this theory, as premise for a rule of law, would be to recognize in the government practically complete power to control the uses of private property in the interest of community æsthetics. An inartistic building façade projects itself into the street no less than a billboard; it may be quite as offensive.

Still another line of argument, which cannot be fully explained here, proceeds from the premise that private property rights are of two kinds, "permissive" and "protected," and that while a permissive right can be exercised, a protected right, which consists of a right of

[60] Professor Freund argues on the other side that "offensive manufactures are useful, and the offense unintentional and inevitable, whereas in the case of an advertisement the owner claims the right to obtrude upon the public an offensive sight which they do not want, and which but for this undesired obtrusion would not be of the slightest value to him." The strength of this argument depends largely upon the definition of the word "useful." Advertisements are certainly "useful" as a medium of business—perhaps quite as useful, economically speaking, as are certain manufactures.

[61] See remarks of Mr. Adam Emory Albright in *Bulletin of the City Club of Chicago*, Dec. 16, 1912.

possession and a right in the physical condition of the property, cannot be exercised although it can be violated.[62] It is urged that the constitutional prohibition against the taking of private property for a public purpose without just compensation applies only to protected rights. Under this view billboard regulations or suppression may be sustained as a proper exercise of the power of the government to regulate or withdraw that which it permits, and to create new protected rights such as the right of mental security. The police power has nothing to do with the matter unless practically the entire law of wrongs be considered as dependent upon that power.

Finally may be mentioned the argument that billboards affect the value of adjacent property to its disadvantage, and that the police power may be exercised in the interest of stabilizing realty values. At this point it is sufficient to remark that the exercise of the police power for this purpose has not as yet been accepted by the courts.[63]

In a case decided by the supreme court of the Philippines[64] in December, 1915, a statute authorizing the removal of billboards was upheld upon the express ground that the police power may be exercised for æsthetic purposes. But the theory of "projection value" and the argument that offensive sights are in the same category as offensive noises and odors were also advanced. Since "the real and sale value of the billboard

[62] Terry, *Advertising Signs on Property*, in 24 *Yale Law Journal*, Nov. 1914, p. 1.

[63] *Infra*, 119–123.

[64] Churchill *v.* Collector of Internal Revenue, 14 *Official Gazette of the Philippines*, p. 383, February 16, 1916.

is its proximity to the public thoroughfares," its regulation or destruction "is not so much a regulation of private property as it is a regulation of the use of the streets and other public thoroughfares." And since the suppression of noises and smells, although "usually upheld on the theory of safeguarding the public health," have, in fact, "little bearing upon the health of the normal person, but a great deal to do with his peace of mind," it is "quite demonstrable" that "proper ministration" to his sense of sight "conduces as much to his contentment as the care bestowed upon the senses of hearing or smell, and probably as much as both together." In respect to the contrary views expressed by American state courts, the Philippine court declared:

> It may be that the courts in the United States have committed themselves to a course of decisions with respect to billboard advertising the full consequences of which were not perceived, for the reason that the development of the business has been so recent that the objectionable features of it did not present themselves to the courts or to the people. We in this country have the benefit of the experience of the people of the United States and may make our legislation preventive rather than corrective.

It seems fairly probable that in the course of time American courts will reverse their earlier decisions and frankly include æsthetics among the subjects for which the police power may be properly exercised. Already there are signs of this eventuality. As the supreme court of Maryland remarked in 1908, "it may be that in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the fine arts, as expressed

and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power even for such purposes."[65]

[65] Cochran *v.* Preston, 108 Md. 220 (1908). See also Attorney General *v.* Williams, 174 Mass. 476 (1899) at pp. 479, 480; *infra*, 94, 107.

CHAPTER IV

CITY PLANNING—BUILDING HEIGHTS AND ZONING

There are at least three policies connected with the modern movement for the better planning of cities which give rise to interesting and important questions of law. One of these is the regulation of the heights of buildings; another is the zoning or districting of cities for various purposes; and the third is the condemnation of property in excess of what is actually needed for specific public improvements.

Limitation on the height of buildings

More than thirty years ago the legislature of the state of New York enacted what was probably the first law in the United States dealing with the subject of the height to which buildings might be erected in cities. This statute provided that in the city of New York no dwelling house or house to be used as a dwelling for more than one family should "exceed seventy feet upon all streets and avenues not exceeding sixty feet in width and eighty feet upon all streets and avenues exceeding sixty feet in width."[1] Since that date a large number of statutes and ordinances have been enacted imposing restrictions upon the heights of buildings in American cities;[2] but these regulations vary in both

[1] Laws of New York, 1885, ch. 454.

[2] For statistics of ordinances of this kind see Koester, *Modern City Planning and Maintenance*, pp. 171–174.

content and purpose. A few of them, as in the case of the early New York law just noted, impose limits on the basis of the use of the building. In others heights are regulated in accordance with the character of construction, chiefly in the interest of protection against fire. In a few of them building heights are fixed with reference to location. But a majority of these regulations simply impose a maximum limit of height, expressed either in feet or in the number of stories allowed, while in some cases the height within the maximum is further fixed in some ratio to the street width. In general it may be said that American limitations upon building heights are exceedingly liberal—far more so than those usually imposed in European cities.

Whether limitations of this kind are properly within the scope of the police power has been contested in a few important cases. The New York law of 1885, for example, was before the courts on the question as to whether hotels were included within its terms. On the general proposition of limiting the height of dwelling houses and of flat or apartment houses, which was apparently not at issue in the case, the court was content to say that there was "no doubt of the competency of the legislature in the exercise of the police power under the constitution to pass such an act."[3] A somewhat famous case on this subject was that in which the supreme court of Massachusetts sustained a statute of 1898 that limited to ninety feet in height all buildings

[3] People *ex rel.* Kemp *v.* D'Oench, 111 N. Y. 359 (1888). See also People *ex rel.* Brown *v.* Brady, 26 N. Y. Misc. 82 (1899), where it was held that the act of 1885 had not been repealed by acts of 1892, 1896, and 1897 requiring fireproof construction for buildings over certain heights. The validity of these later statutes was not questioned.

fronting on Copley Square in Boston.[4] In this instance the statute provided for compensatory damages; but the court did not hesitate to say that "in view of the kind of buildings erected on the streets about Copley Square and the uses to which some of these buildings are put, it would be hard to say that this statute might not have been passed in the exercise of the police power as other statutes regulating the erection of buildings in cities are commonly passed."[5] In the opinion that was written the court very nearly declared that the power of eminent domain, if not indeed the police power, might be exercised in the interest of municipal æsthetics.[6] It is probable, however, that the case cannot be said to have gone so far; and it is certain that other Massachusetts cases have denied this proposition, so far at least as the police power is concerned.[7]

Encouraged evidently by the success of this experiment with reference to Copley Square, the Massachusetts legislature provided in 1904 for the general limita-

[4] For an account of how this law came to be enacted see Robinson, *The Improvement of Towns and Cities*, pp. 69, 70.

[5] Attorney General *v.* Williams, 174 Mass. 476 (1899). See also Attorney General *v.* Williams, 178 Mass. 330 (1901).

[6] After a very general discussion concerning æsthetic considerations in parks the courts said: "It is argued by the defendants that the Legislature in imposing this statute was seeking to preserve the architectural symmetry of Copley Square. If this is a fact, and if the statute is merely for the benefit of individual property owners, the purpose does not justify the taking of a right in land against the will of the owner. But if the Legislature, for the benefit of the public, was seeking to promote the beauty and attractiveness of a public park in the capital of the Commonwealth and to prevent unreasonable encroachments upon the light and air which it had previously received, we cannot say that the law-making power might not determine that this was a matter of such public interest as to call for an expenditure of public money, and to justify the taking of private property."

[7] Commonwealth *v.* Boston Advertising Co., 188 Mass. 348 (1905); Welch *v.* Swasey, 193 Mass. 364 (1907).

tion of building heights in the city of Boston without any provision for damages. In upholding this law the highest court of the state remarked that the police power could certainly be exercised "in the interest of the public health, public morals and public safety," and that "*with considerable strictness of definition*, the general welfare may be made a ground, with others, for interference with rights of property, in the exercise of the police power."[8] "The erection of very high buildings," said the court, "may be carried so far as materially to exclude sunshine, light and air, and thus to affect the public health. It may also increase the danger to persons and property from fire and be a subject for legislation on that ground." Denying that the police power could be used "for purely æsthetic objects," the court, nevertheless, said that if "the primary and substantive purpose of the legislation" is in the interest of such a matter as the public health or safety, "considerations of taste and beauty may enter in as auxiliary."

This case was carried to the United States Supreme Court where the views of the Massachusetts court were generally sustained.[9] Although particular emphasis was laid upon the matter of fire protection, the court declared broadly that "regulations in regard to the height of buildings, and in regard to their mode of construction in cities, made by legislative enactments for the safety, comfort or convenience of the people *and for the benefit of property owners generally*, are valid."[10]

[8] Welch *v.* Swasey, 193 Mass. 364 (1907).

[9] Welch *v.* Swasey, 214 U. S. 91 (1908).

[10] See also Hudson Water Co. *v.* McCarter, 209 U. S. 349 (1907), where the court declared, *arguendo*: "For instance, the police power may limit the height of buildings, in a city, without compensation . . . But if it

In a Maryland case it was intimated that a statute limiting to seventy feet the height of buildings fronting on a public square in Baltimore might be sustained on æsthetic grounds.[11] But the court found "a more substantial reason" in the suggestion that the purpose of the law was "to protect the handsome buildings and their contents in that vicinity, and also the works of art clustered there, from the ravages of fire." And specific reference was made to the damage that resulted from tall buildings in the famous Baltimore fire of 1904.

Although the decisions upon this subject are not numerous, they are all one way. Moreover, the vast majority of ordinances regulating building heights have never been questioned at all. It may be taken as settled, therefore, that limiting the heights of buildings is a proper exercise of the police power in the interest primarily of health and safety. It should be remarked, however, that no city has as yet attempted to impose, under the police power, a limit that would affect buildings already constructed.[12] It is impossible to say what the attitude of the courts would be toward such an interference with actual rather than with potential property values.

Zones from which offensive trades and industries are excluded

From time immemorial cities have been laid off into districts for governmental and administrative purposes.

should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain."

[11] Cochran *v.* Preston, 108 Md. 220 (1908).

[12] The Copley Square legislation affected a building under construction; but in this instance damages were allowed.

Moreover, the policy of creating districts within which certain restrictions are placed upon the private property is by no means of very recent origin. For many years, for example, most cities have established fire districts within which the erection of wooden buildings has been prohibited and other requirements in respect to building construction have been imposed. Such regulations have been usually sustained as measures adopted in the interest of the public safety; and the reasonableness of establishing districts for this purpose, based upon obvious variations in the congestion of buildings in different parts of the city, has scarcely been questioned.[13] For a long time, also, cities have exercised the power of abating *private* nuisances in the form of offensive trades and industries; and specific acts of abatement have often resulted in the relocation of such trades or industries in some other part of the city; for a private nuisance in a thickly settled district need not necessarily be a nuisance elsewhere. On the same principle specified noxious establishments, if they affect an entire community within the city, may be excluded from a designated district or districts as a public nuisance.[14] As early as 1774, for example, the tanners of New York City were ordered to move out of the congested part of the city. It is, however, only

[13] McQuillin, *Municipal Corporations*, sec. 948; City of Olympia *v.* Man, 1 Wash. 389 (1890); Mt. Vernon First National Bank *v.* Sarlls, 129 Ind. 201 (1891).

[14] There is perhaps a slight difference in principle between *exclusion* from specified districts and *assignment* to designated limits. If excluded from specified districts, the establishment may yet be abated elsewhere as a private or common law nuisance. If assigned to designated limits, the question may arise as to the power of the city to legalize a nuisance. Freund, *Police Power*, sec. 179.

in comparatively recent years that cities have attempted to deal generally with such establishments by the policy of exclusion from districts; and the courts have invariably upheld such regulations as a proper exercise of the police power. Thus an ordinance prohibiting the slaughtering of cattle within certain portions of a city has been sustained in New York.[15] In Indiana an exclusion of saloons from the residence sections of cities is valid.[16] In Illinois ordinances were sustained which prohibited, without the consent of property owners, the maintenance of a public garage in a residence block or in places in which two-thirds of the buildings within a radius of five hundred feet were residences;[17] and in New York an ordinance prohibiting a public garage within fifty feet of a school was likewise upheld.[18] So also in Illinois an ordinance prohibiting the keeping of a livery stable in a residence block except upon the consent of a majority of the property owners on both sides of the street has been upheld.[19] In a recent case sustaining an ordinance prohibiting livery stables within a designated district of Little

[15] Cronin *v.* People, 82 N. Y. 318 (1880).

[16] Shea *v.* City of Muncie, 148 Ind. 14 (1896).

[17] People *ex rel.* Busching *v.* Ericsson, (Ill.) 105 N. E. 315 (1914), where the court declared that while a public garage is not a nuisance *per se*, it "is of such a character that it becomes a nuisance when conducted in particular localities and under certain conditions." People *ex rel.* Keller *v.* Village of Oak Park (Ill.), 107 N. E. 636 (1914).

[18] Matter of McIntosh *v.* Johnson, 211 N. Y. 265 (1914).

[19] City of Chicago *v.* Stratton, (Ill.) 44 N. E. 853 (1896). But in Missouri a somewhat similar ordinance, which applied, however, to *any* block, whether residence or otherwise, was held void. City of St. Louis *v.* Russell, 116 Mo. 248 (1893). Under this ordinance livery stables might have been totally excluded from the city.

Rock, Arkansas, the United States Supreme Court declared: [20]

> Granting that it [the livery business] is not a nuisance *per se*, it is clearly within the police power of the state to regulate the business, and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the 14th Amendment. For no question is made, and we think none could reasonably be made, but that the general subject of the regulation of livery stables, with respect to their location and the manner in which they are to be conducted in a thickly populated city, is well within the range of the power of the state to legislate for the health and general welfare of the people. While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the lawmaking power; and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the 14th Amendment.

It seems needless to say, however, that an ordinance of this kind must not create unwarranted discriminations. Thus the California supreme court has recently held void a Los Angeles ordinance establishing a district from which livery stables were excluded. The ordinance was viewed as being "oppressive and discriminatory in creating a small district in which plaintiff has erected and is maintaining his stable, and prohibit-

[20] Reinman *v.* Little Rock, 237 U. S. 171 (1915). In Patout Bros. *v.* Mayor etc. of New Iberia, (La.) 70 So. 616 (1916), a similar ordinance was declared void upon the ground that the city lacked the charter authority to enact such an ordinance.

ing him from longer maintaining it, while in other districts, 'more thickly populated and densely settled and exclusively devoted to residence purposes', permits for the conduct of a like business are liberally granted."[21]

It will be observed that every one of the exclusion ordinances to which attention has been directed might without any violence to reason be readily gathered under one or another of the usual subjects of the police power—the public health, public morals, or public safety. The courts have not always been careful to distinguish between that which is merely offensive and that which is unwholesome and therefore unhealthful. However, even offensiveness that results only from disturbing noises or foul vapors may, not without reason, because of their effects upon human nerves or their interference with sleep or their pollution of the air, be regarded as deleterious to health.[22]

General "industrial" zones

By ordinance enacted in 1911 the city of Los Angeles attempted to deal with the subject of noxious industries in a more comprehensive way than had ever before been attempted by any American city. A number of so-called "industrial districts" were established, and the rest of the city was described as a "residence district." From this latter district provision was made for the complete exclusion of "any stone crusher, rolling mill, carpet beating establishment, fireworks factory, soap factory, or any other works or factory where power other than animal power is used to operate, or

[21] Curtis *v.* City of Los Angeles, (Cal.) 156 Pac. 462 (1916).

[22] Freund, *Police Power*, sec. 1076.

in the operation of the same, or any hay barn, wood yard, lumber yard, public laundry or washhouse." It was further provided, however, that *existing* industries operating with steam boilers might continue to operate if they substituted electric motors for steam boilers. Although all business was by no means excluded from the residence district thus created, the ordinance in question was aimed (1) at certain specified industries of a more or less offensive character, (2) at all existing industries in which steam was manufactured by the burning of coal upon the premises, and (3) against the establishment *in the future* of any manufacturing plant using either steam or electric current. It is highly interesting to inquire as to the fate which this ordinance met at the hands of the courts.

As far back as 1884 the United States Supreme Court had held that "a prohibition to carry on the washing and ironing of clothes in public laundries and washhouses, within certain prescribed limits of the city" between the hours of ten in the evening and six in the morning was "merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety."[23] Regarding such a regulation as a proper exercise of the police power for these usual purposes, the court did not discuss the specific matter of regulation by the district method. In view of this decision it is not surprising that the California supreme court sustained the Los Angeles ordinance in its application to laundries.[24] It was declared in this

[23] Barbier *v.* Connolly, 113 U. S. 27 (1884).
[24] *Ex parte* Quong Wo, 161 Cal. 220 (1911).

first case that arose under the ordinance that "the design of the ordinance here involved was to protect such portions of the city of Los Angeles as are devoted principally to residence purposes from the dangers and discomfort attendant upon the operation of certain kinds of business which, while not necessarily nuisances *per se*, have always been recognized as proper subjects of police regulation." In the view of the court the laundry business had a direct relation to the public health.

Shortly after this decision the ordinance was sustained in its application to a lumber yard.[25] In this second case the court simply relied upon the laundry case and did not discuss the specific subject of the police power which justified the prohibition of lumber yards within residence districts. Had the court been pressed upon this point it is probable that the protection of the public safety against the danger of fire would have been invoked, for it is difficult to see how a lumber yard could have any relation to the public health, unless it were conducted in connection with a mill in which the elements of noise and smoke might have been involved.

The third case that arose involved the application of the ordinance to a brick yard.[26] The court held that the brick business bore a definite relation to the health and comfort of the public. "The burning of brick," it was said, "is a trade which may, when conducted in close proximity to dwelling-houses, be so offensive to those residing in the vicinity as to constitute a nuisance." And the court added, "this is true of all trades

[25] *In re* Montgomery, 163 Cal. 457 (1912).
[26] *Ex parte* Hadacheck, 165 Cal. 416 (1913).

which, in their operation, involve the discharge of smoke or offensive odors in the surrounding atmosphere." This case was carried to the Supreme Court of the United States, where the views of the California court were adopted by the highest court of the land.[27] The court said:

> There was a denial of the allegations that the brick yard was conducted or could be conducted sanitarily, or was not offensive to health. There were affidavits supporting the denials. In these it was alleged that the fumes, gases, smoke, soot, steam and dust arising from the petitioner's brickmaking plant have from time to time caused sickness and serious discomfort to those living in the vicinity.

Most of the opinion was devoted to showing that the owner of the brick yard had not proved that the ordinance was arbitrary or that, being discriminatory, it deprived him of the equal protection of the laws. On the latter point the court declared that the record did not show that others were permitted to manufacture brick upon similarly situated property, nor did it disclose that other objectionable businesses were permitted within the district. As to whether the ordinance could have gone so far as to prohibit the removal of clay for the purposes of manufacturing bricks elsewhere, the court reserved judgment.[28] On the general subject of the exercise of the police power where, as in this case, it resulted in an obvious destruction of a very

[27] Hadacheck *v.* Sebastian, 239 U. S. 394 (1915).

[28] In *Ex parte* Kelso, 147 Cal. 609 (1905), it was held that an ordinance prohibiting the operation of a rock or stone quarry within a certain portion of San Francisco was void on the ground that it deprived the owners of property without due process of law. This case was distinguished by the California court in *Ex parte* Hadacheck, *supra*, on the ground that the owner of the brick yard was not deprived of his right to extract clay. This view was evidently approved by the United States Supreme Court.

considerable property right, the court declared as follows:

> It is to be remembered that we are dealing with one of the most essential powers of government,—one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. . . To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way, they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground, and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus.

Prior to this decision the supreme court of Nebraska had sustained an ordinance that entirely prohibited the erection of brick kilns within the limits of the city of Omaha.[29] The argument was directed specifically to showing that such an establishment was offensive because of the production of smoke and dust; that it was "an inviting place for tramps in cold weather," who might be "turned loose on the residents of the neighborhood in the outskirts of the city, where police protection may be inadequate;" and that "*the value of residence property in the neighborhood might be damaged by relator's enterprise.*" On the other hand, the Colorado supreme court has declared that an ordinance prohibiting the maintenance of a brick yard within twelve hundred feet of any residence, without the consent of the owner of such residence, or of any park or school, with-

[29] State *ex rel.* Krittenbrink *v.* Withnell, 91 Neb. 101 (1912).

out the consent of the city, was unreasonable and a deprivation of property without due process of law.[30] But since this is manifestly a federal question, it must be regarded now as settled by the decision of the United States Supreme Court to the contrary.

Whether there are any proscriptions in the comprehensive Los Angeles ordinance which may not be gathered under the usual subjects of the police power remains yet to be seen. So far as the ordinance applies to coal-consuming industries the protection of the public health may doubtless be invoked on account of the element of smoke. It is difficult to see, however, how a person may be prohibited from using his property for an industry operated by electric current and otherwise unobjectionable on any of the customary grounds advanced in support of an exercise of the police power. Indeed, so far as the common subjects of the police power are concerned, opinions will doubtless differ as to the reasonableness of excluding some of the specific industries mentioned in the ordinance. A lower court in the state of New York has recently sustained an ordinance of Niagara Falls which prohibited the erection or maintenance of *any* factory within a prescribed residence area without the consent of adjacent property owners.[31] The court cited, as controlling, the authority of the United States Supreme Court in the zoning cases involving livery stables and brick yards.[32] As we have had occasion to note, however, the decisions in these cases were expressly rested upon the

[30] City and County of Denver *v.* Rogers, 46 Col. 479 (1909).

[31] *In re* Russell, 158 N. Y. Supp. 162 (1916).

[32] Reinman *v.* Little Rock, *supra*, 99; Hadacheck *v.* Sebastian, *supra*, 103.

protection of the public health. In the New York case there was no evidence whatever that the projected factory would have any relation to the public health; the subject was not even mentioned. Apparently the ordinance was upheld solely upon the ground that "the location and operation of a factory in these surroundings would *greatly impair the value of property in this section and seriously interfere with its proper enjoyment in the purposes to which it has been heretofore devoted.*"

However reasonable it may be to regard the protection of property values as a proper subject of the police power, it is sufficient to remark that the other cases involving the exclusion of industries from residence districts have not been rested wholly or even in large part upon this ground. It is certainly definitely settled, however, that prohibitions may be imposed upon the uses of private property within designated zones or districts of a city whenever such prohibitions are in the interest of the health, safety, or morals of the community; and it is probably fair to say that the concept of what constitutes an offensive or noxious trade or industry has been and is being very considerably widened.[33]

Zones for the regulation of building heights

Apart from the establishment of districts for the exclusion of business that may be classed as more or less offensive in character when carried on in such dis-

[33] In very recent years certain southern cities have been divided into districts for the purpose of segregating the residences of white and colored races. State *v.* Gurry, (Md.) 88 Atl. 546 (1913); Acts of Assembly of Virginia, 1912, ch. 157. Such regulations involve considerations wholly different from those which we have here under consideration; they may, therefore, be omitted from discussion.

tricts, attempts have been made in very recent years to impose upon private property, in accordance with district lines, restrictions of a somewhat different character. An ordinance such as that enacted in the city of Los Angeles cannot, of course, fail to have a very pronounced effect upon the sectional development of the city. At the same time its effect will obviously be limited. In connection with proposals for city planning, it has been urged that cities should be divided into districts and restrictions imposed, first, with reference to the heights of buildings, second, with reference to the part of the lot or lots that may be occupied by buildings, and third, with reference to the uses to which property may be put, regardless of offensiveness.

It has already been pointed out that the courts have universally sustained, as a measure in the interest of public health and safety, limitations upon the heights of buildings. In most of the early cases upon this subject no specific point was made in respect to the districting feature. In the case, however, involving a limitation of the height of buildings around Copley Square in Boston the court was evidently influenced to a very large extent by the character of the district to which this limitation was made to apply.[34] So also in the Maryland case already mentioned, the court declared that the limitation of the height of buildings surrounding a public square in Baltimore was to "prevent the multiplication of such buildings *in this neighborhood* and the increased danger from fire attendant thereon."[35]

[34] Attorney General *v.* Williams, 174 Mass. 476 (1899), *supra*, 91, 94.
[35] Cochran *v.* Preston 108 Md. 220 (1908), *supra*, 91, 96.

In a later Massachusetts case,[36] likewise mentioned above, the court was compelled to consider more definitely the competence of the legislature to regulate the heights of buildings by districts, the statute having provided for the division of the city for this purpose into business and residence districts. In support of the establishment of districts for such a purpose, the court said:

> The value of the land and the demand for space in those parts of Boston where the greater part of the buildings are used for purposes of business and commerce, is such as to call for buildings of greater height than are needed in that part of the city where the greater part of the buildings are used for residence purposes. It was, therefore, reasonable to provide in the statute that buildings might be erected to a greater height in the former parts of the city than in the latter, even if some of the streets in the former are narrower than those in the latter.

This case, as we have seen, was carried to the Supreme Court of the United States [37] where in addition to confirming in a general way the views expressed by the Massachusetts court, the court elaborated at some length upon the superior fire protection that is usually afforded in business districts, as well as upon the fact that few women and children are found in such districts and that few people sleep in such districts. "An undiscovered fire at night," said the court, "might cause great loss of life in a very high apartment house." In other words, the court of highest resort seemed eager to find justification for the regulation of the heights of buildings by districts in the interest of protecting the public safety.

[36] Welch *v.* Swasey, 193 Mass. 364 (1907), *supra*, 95.
[37] Welch *v.* Swasey, 214 U. S. 91 (1908), *supra*, 95.

Since, as we have had occasion to observe, the regulation of heights of buildings has been sustained by reference to the need for protecting the public health and public safety, the cases which sustain the power of the city to create districts for such a purpose as this are in fact entirely in line with those which sanction the creation of districts for the exclusion of offensive trades and industries. Justification for the exercise of the police power is found in one of the usual subjects of such power; the establishment of districts is merely a method of exercising the power. We have had occasion to observe also that the prohibition of billboards in residence districts has been sustained upon precisely the same general line of reasoning.[38] In other words, it may be set down as a fairly established proposition that, in spite of the popular hue and cry about the zoning or districting of cities, the establishment of zones or districts has little or nothing to do with the legal principles involved. The primary question of law is whether the subject sought to be controlled is or is not a proper subject of control under the police power. If it is such a subject, the zoning of the city is merely a matter of detail or method, to which the courts have given and probably will give little attention unless there be evidence of unreasonableness or arbitrariness.

Zones for the establishment of building lines

A limitation upon the portion of the lot that may be occupied by a building may certainly in some instances, as in the case of tenement houses, be justified as a measure in the interest of the public health.[39] The

[38] *Supra*, 84-86.

[39] Freund, *Police Power*, sec. 128.

protagonists in the movement for city planning, however, are far from being contented with so moderate a restriction as this. Every one probably recognizes that, so far at least as appearances are concerned, limitations upon the percentage of lots that may be used for building purposes, or requirements in respect to the detachment of houses, or in respect to the distance of houses back of the street line would be, broadly speaking, "advantageous" in many residence neighborhoods. Many a city residence block has been "spoiled" by the erection of a building in total disregard of the character and location of adjacent buildings and of the not wholly unreasonable wishes of neighboring owners. Here, however, we run squarely upon the contest between the rights of the individual and the rights of the immediate community or of the public at large—a contest, in other words, between the constitutional protection of private property rights and the police power.

In all of the cases that have thus far been adjudicated, decision has been reached against the power of the city to impose regulations of this kind. Thus in Missouri it was held that an ordinance of St. Louis which fixed a building line at a distance of forty feet from the street line on Forest Park Boulevard was void because it deprived the owner of property without due process of law.[40] Without considering the ordinance in specific reference to the police power, the court said:

> The day before the ordinance went into operation, defendant had the unquestionable right to build at will upon his lot; the day afterwards he was as effectually prevented from building on the 40-foot

[40] St. Louis *v.* Hill, 116 Mo. 527 (1893).

strip, except under peril of punishment, as if the city had built a wall around it, and this too without any form of notice, any species of judicial inquiry, or any tender of compensation. If this is not a "taking" of property by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city.

So also in New York a statute was held void which required all buildings to be set back thirty feet on certain parts of Eastern Parkway in Brooklyn.[41] The court did not even mention the police power, but held that the city had undertaken to control an easement in this thirty feet of property and that such an easement "is a constitutional right of property which cannot be taken from its owner without just compensation." In a recent West Virginia case it was held that an ordinance establishing a building line on a particular street was an unconstitutional exercise of the police power.[42] "Under the present status of the law" the court refused to "go counter to the great weight of authority and take advance ground on the question of the police power to regulate and control the use of private property, based on mere æsthetic ground and having no reasonable reference to the safety, health, morals and general welfare of the public at large." Whether the power of eminent domain could be used for such purpose, the court expressly left open for future determination.

A recent case before the United States Supreme Court—that of Eubank *v.* Richmond[43]—may be appropriately considered in this connection, although it did not apparently involve any question of districting.

[41] People *ex. rel.* Dilzer *v.* Calder, 89 N. Y. App. Div. 503 (1903).
[42] Fruth *v.* Board of Affairs, 75 W. Va. 456 (1915).
[43] 226 U. S. 137 (1912), *supra*, 86.

The city of Richmond enacted an ordinance providing that "whenever the owners of two-thirds of property abutting on any street shall, in writing, request the commissioner on streets to establish a building line on the side of the square on which their property fronts, the said commissioner shall establish such line so that the same shall not be less than five feet nor more than thirty feet from the street line." The Supreme Court held this ordinance void upon the following line of reasoning:

> It [the ordinance] leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determines not only the extent of use, but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience, or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed, in the same locality. There may be one taste or judgment of comfort or convenience on one side of a street and a different one on the other. There may be diversity in other blocks; and, viewing them in succession, their building lines may be continuous or staggering (to adopt a word of the mechanical acts) as the interests of certain of the property owners may prompt against the interests of others. The only discretion, we have seen, which exists in the street committee or in the committee of public safety, is in the location of

the line, between five and thirty feet. It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed.

It will be observed that the court laid special emphasis upon the fact that the ordinance in question conferred power on *some* property owners to control and dispose of the rights of others.[44] The court expressly refused to "consider the power of a city to establish a building line" as a general proposition. At the same time the court's stricture upon "so arbitrary a thing as taste" and its difficulty in understanding "how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed" [45] cannot escape notice. It seems evident that at that writing the court was, to say the least, not receptive toward the proposition that the establishment of building lines would be a proper exercise of the police power. And, indeed, it is difficult to see how such a regulation could be reasonably fastened upon any of the usual subjects of such power.[46]

[44] The case was later distinguished from those involving ordinances enacted under the police power which impose prohibitions or restrictions upon the uses of property, but which vest in adjacent property owners the power to remove such restrictions by consent. See Thomas Cusack Co. *v.* City of Chicago, *supra*, 86. While the requirement of the consent of property owners to remove a restriction imposed under the police power has received the sanction of the United States Supreme Court, such a requirement has been held void by some of the state courts. See, for example, City of St. Louis *v.* Russell, 116 Mo. 248 (1893); *Ex parte* Sing Lee, 96 Cal. 354 (1892); State *ex rel.* Omaha Gas Co. *v.* Withnell, 78 Neb. 33 (1907).

[45] Building lines absolutely fixed by municipal authorities might be equally various in their dispositions.

[46] See also City of Philadelphia *v.* Linnard, 97 Pa. St. 242 (1881); *In re* Chestnut Street, 118 Pa. St. 593 (1888); and State *ex rel.* Berger *v.* Hurley, 73 Conn. 536 (1901); all of which involved questions of building lines.

Zones for exclusively residential purposes

From the viewpoint of city planning in its larger aspects, the cases involving attempts to create in cities distinct residence districts from which *all* business is excluded are doubtless of greater importance than any of the cases heretofore mentioned. Such attempts have been recently made in a number of cities, but every one of them has thus far met defeat at the hands of the courts. In St. Louis an ordinance enacted under express authority granted by the legislature in 1891 provided that houses fronting on Washington Boulevard "shall be used as residences only, and no business avocations shall be allowed to be followed in same." The supreme court of Missouri held that this ordinance was an unwarranted invasion of private property rights.[47]

In Maryland questions of this character have been more than once before the supreme court. The earliest of these cases involved an ordinance of the city of Baltimore which prohibited the issuance of a building permit except for a building which "will conform to the general character of the buildings previously erected in the same locality, and will not in any way tend to depreciate the value of surrounding improved or unimproved property." The court held that a citizen had a "common-law right" to build upon and improve his property "as his taste, his convenience, or his interest may suggest or as his means may justify, without taking into consideration whether his buildings and improvements

[47] City of St. Louis *v.* Dorr, 145 Mo. 466 (1898). The statute was also held void as creating a class of cities unwarranted by the state constitution; but the decision on this point was apparently overruled at a later date. See McBain, *The Law and the Practice of Municipal Home Rule*, p. 124.

will conform in 'size, general character, and appearance' to the 'general character of buildings previously erected in the same locality'; even though there might be those in whose 'judgment' his so building might, in some way, 'tend to depreciate the value of surrounding improved or unimproved property'." [48] In a case decided in 1916 the same court held void a statute which required that every dwelling house in a designated section of Baltimore should be "constructed as a separate and unattached building," such buildings to be twenty feet apart if of frame construction and ten feet apart if of masonry construction.[49] The suggestion that semi-detached brick houses would be a menace to the public health or public safety was dismissed as wholly untenable. Even though the erection of such houses in the locality proposed "would undoubtedly depreciate to some extent the value of some property," their erection could not be prevented. "The act," said the court, "does not relate to the police power, and its enforcement would deprive the appellee of property rights guaranteed by the Constitution, which cannot be invaded for purely æsthetic purposes under the guise of [the] police power."[50]

In Chicago a recently enacted ordinance required the consent of the owners of a majority of the property on both sides of the street for the erection of a store "in any block in which all of the buildings are used exclusively for residence purposes."

[48] Bostock *v.* Sams, 95 Md. 400 (1902).

[49] Byrne *v.* Maryland Realty Co., (Md.) 98 Atl. 547 (1916).

[50] See also Stubbs *v.* Scott, (Md.) 95 Atl. 1060 (1915), where, although the ordinance in question was held to be *ultra vires*, the court declared as follows: "Opening stores in some neighborhoods may be injurious to surrounding

In declaring this ordinance void the Illinois supreme court said: [51]

> But even if the municipality is clothed with the whole police power of the state, it would still not have power to deprive a citizen of valuable property rights under the guise of prohibiting or regulating some business or occupation that had no tendency whatever to injure the public health or public morals or interfere with the general welfare. . . . There is nothing inherently dangerous to the health or safety of the public in conducting a retail store. It may be that in certain exclusively residential districts the owners of residence property would prefer not to have any retail stores in such blocks; but if such be the case, it manifestly arises solely from æsthetic considerations, disconnected entirely from any relation to the public health, morals, comfort or general welfare. Legislation, either by the state or by municipal corporations, cannot be sustained for purely æsthetic purposes.

A recent Denver ordinance sought to prohibit, except with the consent of the property owners in the block, the erection in a designated residence section of the city not only of buildings for business purposes but also of apartment houses, flat houses, large rooming houses and hotels.[52] The ordinance further required that every building should be "on a line of the average distance back from the front line of the lots as the buildings on the same side of the street in the same block." The Colorado court found no difficulty in deciding that "a store

properties occupied for residences, but it would be difficult, if not impossible, to prevent an owner from converting his residence into a store building, even in the most exclusive part of the city, if he saw proper to do so."

[51] People *ex rel.* Friend *v.* City of Chicago, 261 Ill. 16 (1913).

[52] It was declared unlawful, without such consent, "to build or erect or make addition to a terrace (for more than two families), apartment house, or flat (for more than four families), store building or factory of any kind, rooming house of more than thirty rooms, hotels or any building similar to those before mentioned."

building is in no sense a menace to the health, comfort, safety, or general welfare of the public . . . whether it stands upon the rear portion of the lots upon which it is erected, or is constructed to the line of the street." Restrictions for æsthetic purposes, said the court, "cannot be upheld."[53] So in New York it was held that an ordinance of Utica which prohibited the "maintenance or conduct" of a public garage within the city limits without a permit from the superintendent of buildings did not prohibit the erection of a building to be "used and occupied for buying, selling, dealing in and otherwise disposing of vehicles, automobiles, motor cycles and other personal property." "It may be said in passing," remarked the court, that "any attempt to exercise any such power would be unconstitutional, for the business of selling such vehicles is as lawful as the sale of groceries or dry goods."[54] In the same state also a lower court has held [55] that a city ordinance establishing a residence district, under the authority conferred by the Housing Act of 1913,[56] was void as the law upon this subject now stands.[57] In this case, however, the court expressed an aspiration "to see the law broadened, not in the direction of Socialism, not to take away one whit from the proposition that all men are endowed with certain inalienable rights, not to interpose a single obstacle to the reasonable and healthy growth of a city, but to prevent a person who owns real estate

[53] Willison *v.* Cooke, (Col.) 130 Pac. 828 (1913).

[54] People *ex rel.* Realty Co. *v.* Stroebel, 209 N. Y. 434 (1913).

[55] People *v.* Roberts, 153 N. Y. Supp. 143 (1915).

[56] Laws of New York, 1913, chs. 774, 798; repealed by Laws of 1915, ch. 32.

[57] Quoting Dillon, *Municipal Corporations*, 5th ed., sec. 695, on the present status of the law.

in a residence district from using the same for any purpose unusual in such districts, unreasonably, and in a spirit that fair men would condemn."

An ordinance of the city of Bay St. Louis, in Mississippi, sought to prevent the erection of anything but open summer houses upon property situated between the shore of the bay and a boulevard lined with such houses. A property owner who wanted to build a market shanty within the prescribed district brought action to enjoin the city from enforcing the ordinance. The supreme court of the state was evidently convinced that the ordinance was drawn in the interest of the "sentiment of a particular class" having "superior cultivation." The ordinance was held "to deprive the owners of property of its lawful use for a supposed public advantage." "Before this can be done," said the court, "there must be just compensation first made."[58]

In 1915 the city of Minneapolis enacted an ordinance establishing a residence district and prohibiting within this district the "erection and maintenance of hotels, stores, factories, warehouses, dry cleaning plants, public garages or stables, or any industrial establishments or any business whatsoever." After a careful review of many cases in point the supreme court of Minnesota held that this ordinance could not be sustained "in so far as it prohibits the erection of ordinary store buildings;" but this was expressly declared not to mean "that it is not valid in so far as it applies to structures which are within the regulatory domain of the police power."[59]

[58] Quintini *v.* Mayor etc. of Bay St. Louis, 64 Miss. 483 (1886).

[59] State *ex rel.* Lachtman *v.* Houghton, (Minn.) 158 N.W. 1017 (1916). Two justices dissented.

The protection of property values as a subject of the police power

The above-mentioned cases present a somewhat imposing array of decisions by the highest courts of the states against the competence of the state, or its agent, the city, to create zones or districts for exclusively residential purposes. This question, although it is obviously a federal question, has not as yet been presented to the highest court of the land. It will be noted that a number of the cases in point, as well as the cases dealing with the power of the city to establish building lines, apparently proceed upon the assumption that the property rights involved *can* be taken from the owners provided just compensation is made.[60] This only gives emphasis to the fact already mentioned [61] that in construing the purposes for which the power of eminent domain may be used, the courts are naturally more generous than they are in defining the scope of the police power. When the precise connotation of words is considered there is in point of fact small margin for this differentiation. The power of eminent domain may be used only for a "public purpose." The police power, say the courts unguardedly, may be employed in the interest of the "public welfare." Unless there be some recognizable distinction between these two phrases,[62] it would seem that these two powers are, so far as *purposes* are concerned, of exactly the same comport.

[60] A recent Minnesota law provides for the establishment of residence districts under the power of eminent domain. Laws of Minnesota, 1915, ch. 128.

[61] *Supra*, 66, 67.

[62] *Infra*, 125 ff.

However that may be, it is certain that if the power of a city to regulate upon this broader scale the uses to which private property may be put is to be sustained as a proper exercise of the police power, some new line of reasoning must be found and pursued. The customary subjects of the police power are of no avail unless it be assumed that the United States Supreme Court, the court of last resort upon such a question, can be induced to sustain restrictions of this kind without close scrutiny, as in the case of billboard restrictions.[63] The difficulty about such an assumption is that property rights of a far more comprehensive character are involved, and that scarcely a shadow of purpose in the direction of protecting the public health or the public safety can be demonstrated. From the viewpoint of the law it is certainly insufficient for the advocates of city planning to declare somewhat vaguely that "the most important part of city planning, so far as the future health of the city is concerned, is the districting of the city into zones;"[64] or to assert that "districting is the only practical method of preventing the spread of congestion;"[65] or to aver that "the setting of a definite limit to the use of land in any particular part of the city, makes it possible to calculate pretty closely just how wide the streets need to be."[66] The courts, as we have seen, are prepared to sustain the principle of zoning in its application to offensive businesses, or the heights of buildings, or even billboards, for the reason that the regulation of such things can, under certain

[63] *Supra*, 85-87.

[64] Marsh, *Introduction to City Planning*, p. 28.

[65] Nolen, *Better City Planning for Bridgeport*, 1916, p. 138.

[66] Robinson, *Width and Arrangement of Streets*, p. 80.

circumstances at least, be justified as measures in the interest of the public health or safety. But the courts must be shown that the erection of a building on the street line or the maintenance of a corner grocery in a residence section of the city is in the same category. As a matter of fact a contention of this kind will be difficult to prove.

Is there, then, any other invitingly propitious line of reasoning that may be invoked? In consideration of the fact that the courts have rarely if ever sustained under the police power legislation that could not be gathered under one or more of its commonly enumerated subjects, it seems almost futile to seek support in those broad descriptions of the police power which, isolated from the context of specific issues, merely provoke the imagination to flights. "Comfort," "convenience," "welfare," and "prosperity" are terms which lend themselves less to definition than to speculation.[67] If such undefinable terms be passed over for practical reasons, it seems unescapable that regulations in respect to building lines or residence districts are always imposed for one of two purposes: to secure æsthetic symmetry, or to stabilize realty values. Both of these purposes may be in mind; but it is perhaps beyond dispute that the latter is primary. Is this a legitimate, a proper, purpose for the exercise of the police power?

It must be borne in mind that the police power, in spite of the terms in which it is commonly described, has its economic as well as its social uses.[68] To sustain

[67] On this point see State *ex rel.* Lachtman *v.* Houghton, (Minn.) 158 N. W. 1017 (1916).

[68] *Supra*, 59, 61.

the stabilization of realty values under this power would doubtless be to create a new economic subject of control. It would seem, nevertheless, that this is precisely what the courts should be asked to do. Arguments of much force may certainly be put forward in support of the wisdom of regulations in the interest of protecting sectional property values. Protection of this kind, when it is founded upon some fairly comprehensive plan involving a considerable number of property owners, may surely be regarded as protection for the public rather than for the property owner as an individual. And if it be urged that the recognition of such a subject of control under the police power would open up possibilities for mistakes of judgment and grave abuses, it may be answered that such possibilities inhere in every exercise of the police power, and that the constitutionality of a new policy of regulation should not be tested in the light of extreme possibilities that assume either ignorance and stupidity or deliberate bad faith.

Even the social subjects of the police power have occasionally an important economic aspect. The public safety, for example, has perhaps been most frequently invoked in the matter of protection against fire. Have our law-makers considered this danger wholly with reference to life and limb? Manifestly not. On the whole it has probably been considered, though not so defined, as an economic rather than a personal danger. It is true that regulations for fire protection have not been in the interest of stabilizing realty values, but many of them have certainly been in large measure for the *protection* of such values. There is many a property owner who would have regretted his fire loss

less than the loss which he suffered by reason of an unforeseen—not to say capricious—change in the neighborhood character of his realty holding.

The United States Supreme Court has declared that the police power may be used "for the benefit of property owners generally;"[69] the Massachusetts court has recognized that differences in the "value of land and the demand for space" may be considered in regulating building heights;[70] the Nebraska court has argued that damage to the "value of residence property" may be at least one reason for excluding a more or less offensive industry;[71] a lower New York court has put forward the impairment of property values as the *sole* reason for excluding factories from residence districts without regard to offensiveness.[72] Why, indeed, may not the protection of property values, not of the individual but of an entire group, be included as an appropriate subject of the police power. Of all the subjects of the police power it would seem that this would be the least open to objection. It is chiefly the property rights of individuals, protected by constitutional provisions, that have stood in the way of an expansion of the police power. But here is a proposal for an exercise of the police power for the creation of new legal property rights in the interest of a group. Are the property rights of many to be sacrificed to the property rights of a single individual because, forsooth, the former are of statutory origin under the police power, while the latter find historical sanction in the constitution?

[69] *Supra*, 95.
[70] *Supra*, 108.
[71] *Supra*, 104.
[72] *Supra*, 106.

CHAPTER V

CITY PLANNING—EXCESS CONDEMNATION

Excess condemnation is a peculiarly American term employed to describe the policy of condemning private property for some purpose that is collateral or incident to a primary public use for which adjacent property is being or has been acquired. When a public improvement is undertaken, such as the opening or widening of a street or boulevard, or the establishment of a park, or some other similar enterprise, it may seem desirable that property in "excess" of what is indispensable for such improvement be taken for one or more of several collateral purposes. From the viewpoint of the law the use of the word "excess" in this connection is unfortunate; it fairly implies that the property is not needed for *any* public purpose. The fact is, however, that the constitutionality of the so-called policy of excess condemnation depends wholly upon the question whether the purpose for which it is employed may or may not be regarded as "public" in character. This arises from two fundamental rules of our law, one of which relates to the power of eminent domain and the other to the power of taxation.

The rule of "public use"

Our state constitutions commonly provide that private property shall not be taken for public use except upon the payment of just compensation; and the United

States Supreme Court has held that this requirement, although not expressed as a federal prohibition against the states,[1] is nevertheless embraced within the guaranty of due process of law.[2] Since this prohibition refers only to property taken for a *public* use, it has been construed by the courts to imply that private property may not be taken for *private* use whether compensation is paid or not.[3] There is also a general rule of our constitutional law that taxes may be imposed only for a public purpose.[4] This rule must likewise be considered; for the property that is acquired under the policy of excess condemnation must normally be paid for by the levying of taxes. The constitutionality of excess condemnation, therefore, depends upon the definition of the terms "public use" and "public purpose." Doubtless these terms may be regarded as identical in meaning. The question is: what is their meaning?

It is impossible to give here any adequate outline of the wide varieties of opinion that have been expressed by the courts on the subject of what constitutes a public use or purpose.[5] An eminent commentator has attempted to summarize the law by declaring that "the

[1] It is expressed in the fifth amendment as a prohibition upon Congress.

[2] Chicago, Burlington & Quincy R. Co. *v.* Chicago, 166 U. S. 226 (1896). "It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle . . . grows out of the essential nature of all free governments." Harlan, J., in Madisonville Traction Co. *v.* St. Bernard Mining Co., 196 U. S. 239 (1904).

[3] McBain, *Taxation for a Private Purpose*, in *Political Science Quarterly*, XXIX, p. 187. A few state constitutions expressly prohibit this taking of property for private uses.

[4] This rule has not as yet been referred to the federal guarantee of due process of law. *Ibid.*

[5] See Lewis, *Eminent Domain*, 3d ed., ch. VII.

different views which have been taken of the words 'public use' resolve themselves into two classes: one holding that there must be a use or a right of use on the part of the public or some limited portion of it, the other holding that they are equivalent to public benefit, utility or advantage." [6] The weight of authority, he thinks, as well as the weight of reason, supports the first of the views. In other words, "*public use means use by the public.*" [7]

In spite of the frequent enunciation of this distinction by the courts, it seems highly questionable whether in fact it gives expression to a very concrete conception. What is the test of a "use by the public"? It is not ownership by the government; for the power of eminent domain may be granted to private persons. It is not that the property acquired must be indispensable to the object sought; for property is often condemned under no such exacting circumstances. It is not that the public shall have a right of access to the property acquired; for the public has no peculiar right of access to lands taken for such enterprises as a waterworks, or a gas or electric plant, or a railway shop or yard, or a large number of other properties that may be secured under eminent domain. It is not that the public enjoys a legal right to demand some kind of service from the authority or person who acquires by eminent domain property to be used in connection with the furnishing of such service; for the public enjoys no *legal* right to demand fire protection, although property may certainly be condemned for fire houses. It is not the

[6] Lewis, *Eminent Domain*, sec. 257.
[7] *Ibid.*, sec. 258.

number of persons affected; for the United States Supreme Court is authority for the rule that in certain circumstances eminent domain may be exercised for the benefit of a single person.[8] Indeed, it would probably be difficult to discover any test or group of alternative tests that could be applied to determine precisely what is meant by a "use by the public."

If it be conceded, then, that the phrase "use by the public" is somewhat undefinable, and that in consequence the distinction between such a use and a "public benefit, utility or advantage" is, after all, not easily demarked, it becomes from one point of view more difficult and from another, less difficult to determine whether property acquired under the so-called policy of excess condemnation is or is not taken for a public use. It is more difficult because there are few if any recognized tests that may be applied; the usual subjects of the power of eminent domain are not even as definitely formulated as those of the police power.[9] It is, on the other hand, less difficult simply because of this indefiniteness. It is manifestly easier to establish a new subject for the exercise of an elastic power of government when the instances of its previous exercise have not been rigidly classified with reference to subject purposes.

Is a constitutional provision necessary?

In Massachusetts, Ohio, Wisconsin, New York, and Rhode Island excess condemnation has been authorized by constitutional amendments. Similar amendments

[8] Clark *v.* Nash, 198 U. S. 361 (1905).
[9] *Supra*, 59 ff.

have been defeated at the polls in California and New Jersey, and a proposed amendment in Pennsylvania failed to receive the approval of a second legislature. In certain other states excess condemnation laws have been enacted without express constitutional sanction. The notion seems to prevail, however, that all doubt in respect to the validity of such laws can be resolved by incorporating a provision upon the subject into the constitution of the state. Indeed, the two Massachusetts amendments were adopted and the Pennsylvania amendment was proposed subsequent to opinions by the highest courts of these states adverse to excess condemnation statutes.

As we had occasion to note at the outset, the United States Supreme Court has definitely gathered the public purpose rule, at least in its application to the power of eminent domain, under the federal guaranty of due process of law. Whether excess condemnation may or may not be practised under our system of jurisprudence is, in consequence, a federal question, although it has not as yet been presented to the highest court of the land. Can a state of the Union draw the teeth of the federal guaranty of due process of law by an amendment to its own constitution to which its own courts will defer? Obviously not, it would seem. A provision of a state constitution may run counter to the fundamental law of the nation as well as a statutory provision. The most that can be said in favor of a state constitutional amendment authorizing excess condemnation is that the state courts would almost certainly defer to it and that the United States Supreme Court would in all probability accord it greater respect than might be

given to a statute passed without such constitutional sanction.

Excess condemnation of remnants of land

Not infrequently it happens that the taking of property for a public improvement operates to leave in the hands of private owners remnants of estates that are ill-suited either for independent development or for advantageous conveyance. In such circumstances it may be urged that the city itself should take over such remnants. But for what purpose? If this be advocated solely on the ground of justice to the owners it may be answered not only that the owner of property condemned is commonly compensated in an amount in excess of the actual market value of his property but also that he is ordinarily paid for property that is damaged as well as for property that is actually taken. If the fragment left on his hands is of little or no economic value, it is needless to say that this fact is usually accounted for in the award that is made to him. But if the city is compelled to pay for the full value of such a remnant there is certainly no reason why the city should not be empowered to take title to it, whether for a definite or an indefinite purpose.

The city may in fact have a definite purpose in view. It may, for example, intend to consolidate a number of such remnants, and to replot and offer them for sale. The public character of the purpose involved in a replotting of lands adjacent to a public improvement will be discussed in more appropriate connection below; it is sufficient to remark at this point that, considered

without reference to other adjoining property, ill-assorted remnants of land abutting upon a public improvement seldom lend themselves to advantageous consolidation and replotting.

The city may, again, desire to acquire remnants of land in order to prevent their non-use. This could be accomplished either by some plan of parking such remnants, or otherwise incorporating them into the scheme of the improvement, or by disposing of them to the owners of adjoining property. If the first of these policies were pursued, there could be little question that the land would be acquired for a public purpose; but the policy of acquiring remnants for subsequent conveyance to adjoining owners raises a wholly different question. In the matter of such conveyance the city would enjoy no advantage over against the previous owner of a remnant except that the city might be willing to sell at a lower figure in order to induce purchase by the owner of the adjoining property. It is clear, however, that unless the city imposed upon the purchaser requirements in respect to use, the property might still remain unused, and nothing would be accomplished except the creation at the public expense of a *potential* usefulness by reason of a change of ownership. Since the acquisition of "excess" property in order to resell it, subject to restrictions upon its use, is one of the larger purposes for which the policy of excess condemnation has been urged, it seems unnecessary to discuss as a separate proposition the character of the purpose that is involved where remnants are acquired to prevent their not being used. Such a purpose, whether public or private, can be fully accomplished only by the im-

position of requirements or restrictions in the deeds of resale; and it is difficult to see how such a policy with respect to remnants can be distinguished in kind from a like policy applied to parcels of land which are not remnants.

Another possible object of the city may be to prevent the "misuse" of remnants. An ill-shaped bit of land may be suitable only for the erection of a billboard or of a building wholly out of keeping with the character of the neighborhood and the wider purposes of the public improvement. Here again, however, whether such a purpose be regarded as public or private, it is manifest that the city can prevent such "misuse" only by incorporating the remnants into the improvement itself or by reselling them subject to restrictions in respect to use.

Indeed, it seems patent that, unless undertaken as a matter of justice to the owner or for incorporation into the improvement itself, the acquisition of "excess" remnants can be justified only upon grounds that would also justify the acquisition of lots which are not remnants.

For the most part American condemnation laws have sought to mete justice to the owner of land taken by paying him for any damage that is done to a remnant left upon his hands. Where the award for such damage is approximately equal to the full valuation, as it often is, a transfer of title to the city becomes, it would seem, a matter of justice to the city rather than to the owner. Although not many cities have been legally competent to take title to such a remnant, in a few instances statutes have attempted to deal with this matter.

Thus a New York law of 1833[10] authorized the village of Brooklyn to take over remnants "in cases where injury or injustice would otherwise be done, *and with the consent in writing of the owner or owners.*" Similar in character were a Louisiana statute of 1832,[11] a Massachusetts statute of 1866,[12] and a Maryland statute of 1904.[13] These laws, which merely *authorized* the taking of title, leaving an option both to the municipal corporation and the owner, appear not to have been contested before the courts.[14] While they pointed the way to justice, they can scarcely be said to have insured it either to the city or the owner.

Of quite a different character were a South Carolina law of 1810,[15] a Maryland law of 1838,[16] and Massachusetts laws of 1865 and 1904,[17] which made it *obligatory* upon the city to purchase a remnant in case the owner elected to part with his entire lot. Here the obvious intention was justice to the owner; and while these laws apparently gave slight consideration to the interests of the city, it may well be that they operated more lightly upon the public than those more numerous statutes which compel payment for injury to remnants but neither authorize nor require the assumption of title

[10] Laws of New York, 1833, ch. 319.

[11] Act of April 3, 1832.

[12] Acts of Massachusetts, 1866, ch. 174.

[13] Acts of Maryland, 1904, ch. 87.

[14] The Louisiana act was before the court in Pierre Boulat *v.* Municipality Number One, 5 La. Ann. 363 (1850); but it is not clear what the owner, who had abandoned his lot to the city, was suing for.

[15] Mentioned in Dunn *v.* City of Charleston, Harper's Law (S. C.) 189 (1824).

[16] Laws of Md., 1838, ch. 226.

[17] Acts and Resolves of Massachusetts, 1865, ch. 159; *ibid.*, 1904, ch. 443.

to them by the city. Needless to say, no such law has ever been declared void.[18]

Quite otherwise in intent was a New York law of 1812[19] which authorized the city of New York to take the whole of any lot, where any part of it was needed, whenever the *city* deemed it expedient to do so. Thereafter the city might either sell the excess land or appropriate it to some public use. This was clearly an authorization of excess condemnation in the modern conception of the term. But this law was declared void.[20] There could be no objection, said the court, to a taking by the city *with the owner's consent;* without such consent, however, this would be a taking of the private property of one person for the private use of another to whom the city conveyed it. In South Carolina, likewise, it was early declared that the legislature could not empower a city to condemn remnants without the owner's consent.[21] A Pennsylvania law enacted in 1868, which conferred upon the Fairmount Park Commission of Philadelphia power to acquire excess remnants by condemnation,[22] was apparently never contested before the courts, and was probably made use of only in a single

[18] The South Carolina statute of 1810 was not in question in the Dunn case, *supra*, but was referred to with approval. A Baltimore ordinance of 1858, enacted under the law of 1838 (every ordinance on the subject since 1838 had contained similar provisions), was sustained in Mayor, etc., of Baltimore *v.* Clunet, 23 Md. 449 (1865).

[19] Laws of New York, 1812, ch. 174.

[20] In the matter of Albany Street, 11 Wend. (N. Y.) 149 (1834); reaffirmed in Embury *v.* Connor, 3 N. Y. 511 (1850), and Bennett *v.* Boyle, 40 Barb. (N. Y.) 551 (1863).

[21] Dunn *v.* City of Charleston, Harper's Law (S. C.) 189 (1824). The law in question was enacted in 1817. The view thus expressed was in fact dictum, for by a very strained construction of the law the court held that the legislature had not attempted to confer such power.

[22] Laws of Pennsylvania, 1868, no. 1020.

instance.[23] In 1904 the legislature of Massachusetts authorized the commonwealth itself, as well as any city, to condemn excess remnants in cases where "the remnant left . . . would from its size or shape be unsuitable for the erection of suitable and appopriate buildings, and if public convenience and necessity require such taking." Grudgingly, the supreme court of Massachusetts gave approval to this statute.[24] The opinion declared:

> In our judgment it [the statute] goes to the very verge of constitutionality. The grounds on which we are inclined to sustain it . . . are, first, that there can be no taking outside the location of the public work, except for a remnant of an estate a part of which is actually required for the laying out or alteration of the public work, and then only if the remnant left after taking such part would, from its size or shape, be "unsuited for the erection of suitable and appropriate buildings,"—in other words, only when there is a remnant that is too small or too ill-shaped to be of any practical value for the use to which valuable land is commonly put; and secondly, that such a remnant can be taken only upon an adjudication that public convenience and necessity require the taking. Unless it can be said that public convenience and necessity never can require the taking of such a remnant the statute cannot be declared unconstitutional.
>
> While it is plain that a city or town cannot take land outside a public work for speculative purposes, we can conceive of a remnant of an estate, a part of which is necessarily taken, which remnant is so small, or of such a shape and of so little value that the taking of it in the interest of economy or utility, or in some other public interest, may be fairly incidental and reasonably necessary, in connection with the taking of land for the public work.

It will be observed that the court was here extremely vague in discussing the public purpose that would be

[23] Cushman, *Excess Condemnation*, p. 61.

[24] Opinions of Justices, 204 Mass. 616 (1910).

served by the condemnation of the limited class of remnants to which the law applied.[25] The statute itself permitted condemnation only when "public convenience and necessity required." It would seem that any land that is *required* by "public convenience and necessity" must be regarded as being condemned for a public purpose or use. The question is: what public convenience or necessity could be served by the condemnation of these small-sized or ill-shaped remnants? The court suggests "economy" and "utility"—presumably "public economy" and "public utility." The latter term as used in this connection can mean only public usefulness; but useful to the public in what respect, for what purpose? In using the term public economy the court probably had in mind that the city might condemn the whole and resell the excess remnant at less net expense than it could condemn only the part actually needed; but it is difficult to see why this should be possible except upon the assumption that the city would in reselling, intercept an unearned increment of value created by the improvement. But if this is a public purpose for which excess condemnation may be employed, surely it should not be restricted to insignificant and ill-shaped remnants.

On the whole, it would seem that, although the act in question was sustained, the Massachusetts court had no very definite idea of what public purpose was in view. In any case, it is manifest that an act hedged about with such extreme restrictions could be of small practical avail. We have in point of fact had very little experience with statutes providing for the acquisition of rem-

[25] This opinion was given to the legislature upon request; the court did not, therefore, have before it any specific application of the law. This doubtless accounts in part for the generality of the discussion.

nants without the consent of owners. Moreover, as already pointed out, it is well nigh impossible to see how the taking of a remnant from a reluctant owner can be justified upon any ground that would not also justify the taking of a lot which was not a remnant.

Excess condemnation for the "protection" of public improvements

When a city lays out, widens, or otherwise improves a street, parkway, or boulevard, it often has a purpose (whether it be expressed or not, and whether it be regarded as "public" or not) that is broader than the mere, though main, purpose of furnishing a highway for travel. It may have in contemplation a highway of a definite character—that is, character as determined by the uses to which abutting property is put—a street for handsome residences, or for workmen's houses, or for commercial uses. Now the policy of excess condemnation has been urged, perhaps primarily, as an instrumentality by which the city may exercise larger control over the character, as thus defined, of its streets, boulevards, parks, and other public places. The "protection" of a public improvement is manifestly a vague expression; but it seems to describe as well as any other the *general* purpose here under consideration.

The policy of condemning property for the "protection" of public improvements is of comparatively recent advocacy in the United States. As yet we have had more constitutional provisions and laws upon the subject than actual exercises of the power conferred and resulting judicial determinations as to its validity. An examination of constitutional provisions and laws

upon the subject reveals that, so far as their purposes are disclosed by their letter, they fall into two general classes.[26] There are, in the first place, those which define, at least in general terms, the purposes for which excess condemnation may be employed and restrict the exercise of the policy to these purposes. There are, in the second place, those which upon their face apparently authorize the use of the policy for purposes which are wholly undefined.

In the first of these categories may be placed an Ohio law of 1904,[27] which authorized cities to condemn property in excess of actual needs "for the purpose of reselling such land with reservations in the deeds of such resale as to future use of such lands so as to protect public buildings and their environs and to preserve the view, appearance, light, air, and usefulness of public grounds occupied by public buildings and esplanades and parkways leading thereto." Of the same general character in respect to an indication of purposes are the constitutional amendments adopted in Ohio [28] and Wisconsin [29] in 1912, a Virginia law of

[26] A valuable analytical table of constitutional provisions and statutes upon the subject is found in Cushman, *Excess Condemnation*, pp. 218–239.

[27] Laws of Ohio, 1904, p. 333, amending sec. 10 of the municipal code of 1902; reenacted without alteration, *ibid.*, 1908, p. 207; General Code of Ohio, 1910, I, p. 788, sec. 3677, par. 12.

[28] Art. XVIII, sec. 10. This grant is greatly restricted by the provision that bonds issued for such purpose "shall be a lien only against the property so acquired for the improvement and excess." *Infra*, 159.

[29] Art. XI, sec. 3a. A proposed amendment of broader scope was defeated in Wisconsin in 1914. Amendments requiring that restrictions be imposed on excess property when resold were also defeated in California (Art. XI, sec. 20) in 1914 and again in 1915, and in New Jersey (Art. IV, sec. 9) in 1915. A similar amendment was proposed in Pennsylvania (Art. IX, sec. 6) in 1915 but failed to pass the legislature in 1917.

1906,[30] a Pennsylvania law of 1907,[31] a Maryland law of 1908,[32] two Wisconsin laws of 1909 and another of 1911,[33] an Oregon law of 1913,[34] and two New York laws, of 1911 and 1915.[35]

In the case of every one of these constitutional provisions and statutes, the purposes for which the policy of excess condemnation may be resorted to are set forth in more or less general terms. In spirit, if not indeed in letter, they limit the use of the policy to the purposes indicated.[36] The question is: are these purposes *public* purposes? In only one or two jurisdictions has this question been considered.

The Pennsylvania law of 1907 authorized cities to

[30] Acts of Virginia, 1906, ch. 194; amended, *ibid.*, 1916, ch. 71, so as to authorize the taking of excess property for the purpose of replotting, as well as for "imposing limitations as to the uses thereof."

[31] Laws of Pennsylvania, 1907, no. 315.

[32] Laws of Maryland, 1908, ch. 166.

[33] Laws of Wisconsin, 1909, chs. 162, 165; *ibid.*, 1911, ch. 486.

[34] Laws of Oregon, 1913, ch. 269.

[35] Laws of New York, 1911, ch. 776; *ibid.*, 1915, ch. 593. The 1911 law authorized the city of New York, in connection with the improvement of its waterfront facilities, to acquire lands "additional and adjacent" to terminal ways or stations and to dispose of such lands "after the same shall have been replotted, regraded or otherwise adapted for such access, use or improvement . . . subject to such restrictions as said board (of estimate and apportionment) may see fit to impose thereon to promote such access or use to effect such improvement."

[36] It may be urged, of course, that the city in reselling might impose restrictions of so negligible a character that the purposes indicated by the law would not in fact be accomplished. This would be a difficult matter to control, for it is obvious that large discretion must be vested in the authorities empowered to carry out the policy. A lower Pennsylvania court, however, declared void an ordinance of Philadelphia on the ground that it did not specify the restrictions that should be imposed. Pennsylvania Mutual Life Ins. Co. *v.* Philadelphia, 22 Pa. Dist. 195 (1913). The supreme court of the state subsequently held void the statute under which the ordinance was enacted; *ibid.*, 242 Pa. St. 47 (1913).

condemn property in excess of what was needed for certain public improvements and to resell such property "with such restrictions in the deeds of resale in regard to the use thereof as will fully insure the protection of such public parks, parkways and playgrounds, their environs, the preservation of the view, appearance, light, air, health and usefulness thereof." Brought before the highest court of the state, this statute was declared void.[37] Briefly put, the argument of the court was that a "public use" is a "use by the public." In this case the "protection of the highway is the only 'public use' to which the land is to be applied." But this is not a "use by the public." "Saving the restriction contained in the conveyance, the city can exercise no control over it"—the land so condemned—"and hence cannot *use* it for *any* purpose." Even if it be conceded that it is a "legitimate public use" to "protect the highway and preserve the light, air, etc.," the city "is not permitted to hold it for that or any other public purpose." The act simply authorizes the city to take the property of one person and convey it to another.

In a recent Maryland case [38] the excess condemnation law enacted in that state in 1908 was before the supreme court. As a result, however, both of the nature of the action, which was to restrain a bond issue, and of the highly complicated statutory situation that was involved, it is impossible to declare whether the court intended to uphold the policy of excess condemnation, or to draw the teeth of the statute, or to leave the entire question open. Certain it is that in the opinion that

[37] Pennsylvania Mutual Life Ins. Co. *v.* Philadelphia, 242 Pa. St. 47 (1913).
[38] Duke Bond *v.* Mayor, etc., of Baltimore, 116 Md. 683 (1911).

was read nothing was added to or taken from the sum of legal reasoning upon the subject.

In 1910 the Massachusetts House of Representatives asked the supreme court of that state whether the legislature could constitutionally authorize the city of Boston to lay out a commercial thoroughfare through the heart of the city and to take by condemnation land on either side thereof in order to replot and resell the same under restrictions that would insure its use for suitable warehouses, mercantile establishments, and other buildings suited to the needs of commerce and trade. The court replied with an emphatic "no". "It is plain," the opinion recited, "that a use of the property to obtain the possible income or profit that might enure to the city from the ownership and control of it would not be a public use. . . It is equally true and indubitable that a management and use of such property to promote the interests of merchants or traders who might occupy it, and to furnish better facilities for doing business and making profits, would not be a public use of the real estate."[39]

The three opinions just mentioned are, down to the present time, the only judicial utterances upon the subject of excess condemnation for the "protection" of public improvements. Reading them, one can scarcely escape the conclusion that the last word has not been said. The apparent burden of the Pennsylvania opinion is that "use by the public" involves continuous ownership by the public. Almost the entire history of the power of eminent domain belies this notion. If it be

[39] Opinion of Justices, 204 Mass. 607 (1910); reaffirmed in an opinion to the Senate, which had presented the same questions in somewhat modified phraseology; Opinion of Justices, 204 Mass. 616 (1910).

conceded, as the Pennsylvania court conceded, though probably only for argument, that the "protection" of a public improvement is a "legitimate public use," is the test of public ownership a proper test to apply? A railway or other public service corporation may be—usually is—vested with the power of eminent domain. If the operation of a railway and the "protection" of a public improvement are equally "public" purposes, how can it be asserted that private ownership is of no importance in the one case but is an insuperable objection in the other? What possible difference can there be between the condemnation of property for a privately owned railway, which property becomes impressed with a public use because of the character of railway business, and the condemnation of property for any other private person when the property likewise becomes impressed with a public purpose by reason of limitations that are imposed upon its use? The public has no right of ownership in or access to a railway shop; it enjoys the same lack of rights in respect to property acquired and subsequently sold under the policy of excess condemnation. Its right in each case consists merely in a right of service—the right to be carried or to have goods carried in the one, the right to have a highway or other public ground "protected" in the other. A private owner of property condemned and sold under the policy of excess condemnation may be regarded as a "public agent" just as reasonably as may a railway corporation. In other words, it seems perfectly patent that to concede that the purposes indicated by the Pennsylvania law were public purposes was to concede the entire point at issue.

The opinion of the Massachusetts court goes more nearly to the core of the issue, whether one agree or disagree with the conclusion reached. It nevertheless appears to fall very far short of a complete analysis of the purposes sought. Every one must recognize that the condemnation and resale of property subject to restrictions as to use operates to transfer the property of one private person to another. This, it would seem, has nothing to do with the case, for so does the condemnation of property for railway uses. The issue cannot turn upon the matter of private ownership; it is solely an issue as to the nature of the purpose that is sought. Boldly, and probably fairly, stated, the purpose that is sought must be rested upon one or more of the following considerations: æsthetics, public health, or the creation and stabilization of realty values.

As we have had occasion to note,[40] more than one court has intimated that while the police power may not be exercised for æsthetic purposes, the power of eminent domain might perhaps be employed to that end. As yet, however, no court has actually applied this as a rule of law.[41] The pros and cons of this proposition scarcely call for extended discussion. Individual opinions will naturally differ after all has been said. Certain it is, however, that a refusal to establish this rule should not be made by a consideration of extreme possibilities —more especially since any attempt to condemn excess property for the purpose of imposing capricious restrictions in the name of æsthetics would be foredoomed to

[40] *Supra*, 67, 77, 79, 94, 111, 118, 119.

[41] The Massachusetts court approached very near to its application in Attorney-General *v.* Williams, 174 Mass. 476 (1899), *supra*, 94.

practical failure. Money collected from taxpayers is freely expended in the embellishment of parks and boulevards. The purpose is obviously æsthetic; but nobody is heard to urge that this is a private purpose. A heedless owner, by the use to which he devotes his abutting property, ruthlessly impairs an æsthetic result which the city has sought to create. It does not seem wholly unreasonable that the city should be legally competent to prevent this. The condemnation of this property and its subsequent sale under limitations in respect to its use is certainly one method of prevention. Whether it is the *most* satisfactory and the *most* equitable method is open to debate. But that is a question of policy rather than of law—similar, for example, to the question whether a public improvement should be paid for by special assessments or by general taxation. If it be conceded that it is a public purpose to prevent the impairment of an æsthetic value created by the public—which is, after all, a complete statement of the question involved—the policy of excess condemnation, pursued for the achievement of that purpose, should doubtless be sustained. In the course of time it doubtless will be so sustained.

In spite of the mention of "light," "air," and "health," in many of the laws which lay down the purposes for which excess condemnation may be employed, it is probably fair to say that in most of them the purpose of protecting the public health is in fact wholly remote. Any reasonable limitation upon the use of private property in the interest of the public health, as in the case of the regulation of building heights, or the banishment of noxious trades and industries, can be accomplished

under the police power. And while it may be argued, as above, that excess condemnation is at least one method by which the interests of the public health may be protected, it is well nigh inconceivable that any city would embark upon a policy fraught with so many economic perils to secure an end which might much more easily be attained by other means.

The condemnation of excess property might, of course, be undertaken for the purpose of affecting housing conditions; its relation to public health would then be clearly established. In at least one instance in the United States its use has been authorized for this purpose. In 1912 the supreme court of Massachusetts, upon request for its opinion, informed the legislature that a proposed statute conferring upon the homestead commission power to condemn land for the purpose of erecting workmen's houses would be unconstitutional if enacted. The court saw no further than that "the home of one wage-earner might be taken by the power of the commonwealth for the purpose of handing it over to another wage-earner." [42] In 1915 a constitutional amendment was adopted which directly empowered this commission to use the power of eminent domain for the purpose of relieving congestion of population by providing such houses. Whether this amendment is valid under the federal guaranty of due process of law has apparently not been contested. The proposal that the city should construct workmen's houses either for sale or lease is fairly novel among American municipal functions. So clearly, however, is the purpose in view related to the promotion of public health that it is diffi-

[42] Opinions of Justices, 211 Mass. 624 (1912).

cult to see why the use of excess condemnation for such a purpose should not be sustained.

It has already been noted [43] that the stabilization of realty values is one of the purposes for which the general policy of zoning cities has been urged. There is no question that the creation as well as the stabilization of such values is likewise one of the purposes for which the policy of excess condemnation has been put forward under the broadly expressed design of "protecting" public improvements. The mere replotting of abutting lands, whether solely for the absorption of ill-adapted remnants or for the larger purpose of creating indivisible lots of size and shape adapted to particular uses,[44] may doubtless be fairly regarded in this light. The employment of excess condemnation with such an end in view may be said to "protect the usefulness" of the improvement in question; but "usefulness" in this connection, whether the reference be to an indirect "usefulness" to the general public or the more direct "usefulness" to a portion of the public—the purchasers of the newly formed lots—is dependent wholly upon the establishment and maintenance of private realty values. The protection of such values is even more clearly evidenced in a restriction that property along a boulevard, park, or parkway may be improved only with residences that satisfy certain minimum requirements.

It has already been suggested that the time is probably ripe for the inclusion of the stabilization of realty

[43] *Supra*, 121 ff.

[44] As in the case of the proposed New York waterfront improvements or the proposed commercial thoroughfare in Boston.

values among the recognized subjects of the police power. Nothing need be added here to the arguments already adduced upon that point.[45] Surely, however, if this be regarded as a proper subject for police legislation, there can be no question that it is likewise a public purpose for which the power of eminent domain may appropriately be exercised.

Excess condemnation for undefined purposes

A few of the constitutional provisions and statutes upon this subject, while enumerating purposes similar to those mentioned above, expressly authorize the disposal of excess lands "with or *without* suitable restrictions." In this category may be placed a Massachusetts constitutional amendment of 1911 and several laws enacted pursuant thereto,[46] a Rhode Island constitutional amendment of 1916,[47] a Connecticut statute of 1907 applicable to Hartford, and a similar statute of 1913 applicable to New Haven.[48] Still another group of amendments and statutes authorize the condemnation of excess property without indicating even in general terms the purpose for which the power may be exercised and without making *any* reference to the imposition of restrictions. Of this character are the New

[45] *Supra*, 121 ff.

[46] Art. X, Part I, submitted and adopted after the adverse opinions mentioned, *supra*, 140. See also an amendment which was proposed by the general court in 1914 but which failed to be reenacted in 1915; Acts and Resolves of Massachusetts, 1914, p. 799. *Ibid.*, 1912, ch. 186; *ibid.*, 1913, chs. 201, 326 (specific street improvements in Worcester); *ibid.*, 1913, ch. 703 (specific street improvement in Salem); *ibid.*, 1912, ch. 715, *infra*, 148.

[47] Art. XVII.

[48] Special Laws of Connecticut, 1907, no. 61, sec. 7; *ibid.*, 1913, no. 243, sec. 8.

York constitutional amendment of 1913 [49] and a pursuant statute applicable to Syracuse,[50] a New Jersey law of 1870 applicable to Newark,[51] and a Massachusetts law of 1913 which vested power in the state highway commission with respect to a specific street improvement.[52]

Now it seems clear that, unless the *only* purpose of the city is to secure financial recoupment for its outlay or to gather into the public treasury the total increment of value created by the improvement by selling excess lands at a profit above the condemnation awards, *the imposition of restrictions is indispensable to the full accomplishment of any purpose that may be regarded as public in character.* Even if the purpose is nothing more than the replotting of the land into "suitable building sites," it would seem that restrictions are necessary; otherwise there would be nothing to prevent the new owners from defeating the city's purpose by reselling "unsuitable" sites from parts of their holdings. In the absence of restriction in his purchase deed an owner is entirely competent to divide and sell off his land as he pleases; and it is open to grave doubt whether the replotting of land could be sustained as a public purpose

[49] Art. I, sec. 7. A proposed amendment of even broader scope was defeated at the polls in 1911. A similar amendment was defeated in Wisconsin in 1914.

[50] Laws of New York, 1914, ch. 300.

[51] Laws of New Jersey, 1870, ch. 117. This law appointed a commission to purchase or condemn all the property in a section of Newark known as Clinton Hill. After relocating streets and alleys the commission was empowered to replot the land and sell off the lots. No reference was made to the imposition of restrictions. It is not clear that this was a housing project, although the preamble recited among other things the danger from fire by reason of the narrow streets in the section. The law was apparently not contested before the courts.

[52] Acts and Resolves of Massachusetts, 1913, ch. 778.

under circumstances which might result in an immediate defeat of the purpose by private persons.[53]

It is probable that under every one of these laws the city, becoming the fee simple owner of the land, could resell it subject to restrictions if it chose to do so. But the fact remains that these laws *permit* the resale *without* restrictions.[54] On their face the power which they confer might be exercised for no public purpose whatever. It seems fair to conclude, therefore, that, at least when they are considered independently of any actual exercise of the power conferred, in which a purpose *might* be disclosed by the character of limitations imposed, they can be sustained as such only upon grounds of finance.

One law of this kind has been brought before the courts. This was the Massachusetts law of 1912 [55] which empowered the Salisbury Beach Reservation Commission to condemn certain lands along the seashore, and to sell or lease, with or without restrictions as to use, such parts thereof as might not be needed for a public reservation. The court very promptly, and it would seem very properly, declared this statute void

[53] Of course it may be argued that, having replotted the land to advantage, the city may trust the rest to the good sense and the business judgment of the purchasers. But the law must take account of possibilities, especially when, as in this case, it is proposed to use an important power of government for a borderland purpose.

[54] The New York constitutional amendment merely permits the legislature to authorize cities to condemn excess property. The validity of this constitutional provision, as a federal question, could be contested only in connection with some statute enacted pursuant thereto. It is certain that the legislature in enacting such a law could define purposes and require the imposition of restrictions. Of the two laws enacted under this provision, one required restrictions (Laws of New York, 1915, ch. 593) and the other did not (*ibid.*, 1914, ch. 300).

[55] Acts and Resolves of Massachusetts, 1912, ch. 715.

on the ground that no public purpose was disclosed.[56] The constitutional amendment of 1911, which authorized excess condemnation, was not even referred to in the course of the opinion that was handed down.

Excess condemnation for financial profit

Both in law and in practice the policy of assessing upon adjacent property (on the theory of special benefit conferred) some part or the whole of the cost of certain public improvements is firmly established in the United States. So far as mere recoupment for outlay is concerned, this policy, it would seem, ought to satisfy the necessities of the case; where there are constitutional or statutory prohibitions against assessing the *entire* cost of the improvement, let these prohibitions be removed, if complete recoupment is the end that is sought. It sometimes happens, however, that the unearned increment of value created by a public improvement is far in excess of its total cost. Why should not the public secure this entire increment to itself by condemning the adjacent land at its value *before* the improvement is made, and selling it at its increased value *after* it is made?

Unearned increments in city land values are due to a variety of causes. Public improvements, even if they be only ordinary street improvements, are perhaps always contributory; occasionally, they are the sole cause of a direct and measurable increment. It may seem a small step to cross from the policy of levying special assessments, by which a *part* of the unearned increment

[56] Salisbury Land & Improvement Co. *v.* Commonwealth, 215 Mass. 371 (1913).

is intercepted, to a policy of excess condemnation under which the *whole* of it might be secured to the public. Doubtless the principal difference lies in the fact that special assessments are very nearly, if not quite, assimilable to ordinary taxes, while the acquisition of land for the more or less speculative purpose of reselling it at a profit is more nearly assimilable to ordinary business.

We have no judicial opinions directly in point upon the validity of excess condemnation when undertaken for financial profit. The nearest approach to a consideration of such a question is found in certain cases which deal with the competence of cities to acquire land generally for purposes of gain—in other words, to go into the real estate business.[57] Most of these cases have, however, involved merely questions of charter power and not a question of constitutionality. Moreover, in any event, it may be strongly argued that the taking of land for the purpose of securing an unearned increment that is directly and entirely traceable to a specific public improvement may be distinguished in kind from the acquiring of land for the more general purpose of profiting by rents or of securing unearned increments that are due to a combination of indeterminate causes. It seems unnecessary, therefore, to discuss these cases in detail.

Whatever bearing these cases may have upon the question whether excess condemnation may be used for

[57] First Municipality of New Orleans *v.* McDonough, 2 Rob. (La.) 244 (1842); New Shoreham *v.* Ball, 14 R. I. 566 (1884); Champaign *v.* Harmon, 98 Ill. 491 (1881); Hayward *v.* Red Cliff, 20 Col. 33 (1893); Hunnicutt *v.* City of Atlanta, 104 Ga. 1 (1898); Libby *v.* City of Portland, 105 Me. 370 (1909).

the making of financial profits, it should be borne in mind that no constitutional provision or statute upon this subject has as yet specifically named this as a purpose. It is highly improbable that the courts would be inclined to sustain this as a *public* purpose under those statutes which apparently permit the condemnation of excess property for purposes that are wholly undefined.

Alternatives to excess condemnation

With the exception of replotting (including the absorption of remnants), which would manifestly involve changes of title, it is probable that every one of the purposes for which excess condemnation has been put forward could be accomplished by action short of a complete taking of title to the land. The interests of æsthetics and public health, and the creation and stabilization of realty values by imposing conditions as to use could no doubt be secured by the condemnation of easements merely.[58] Financial recoupment could be attained by the removal, where they exist, of limitations upon the proportion of the cost of public improvements that may be assessed upon adjacent property. The interception by the public of the whole of the unearned increment created by a public improvement could be brought about by the development of some form of increment taxes. The possibilities that inhere in these alternatives have little, if anything, to do with the primary question of law involved, and may, therefore, be omitted from discussion.

[58] As in the case of the Copley Square project; Attorney-General *v.* Williams, 174 Mass. 476 (1899); *supra*, 94.

From the analysis that has been attempted above, it seems obvious that the legal obstacles arising out of the rule of public use or purpose in its application to excess condemnation, although large and somewhat complicated, are not necessarily insuperable. That there has been so little actual employment of the policy in spite of the number of laws authorizing its use may perhaps be taken to indicate that there are practical objections, due to patent financial hazards, which loom quite as large as any obstruction ascribable to the law. In due time the legal issue will be settled by the United States Supreme Court. In the meantime, it would seem the part of wisdom that the purposes for which excess condemnation may be used should be written as clearly as possible upon the face of the constitutional provisions and statutes dealing with the subject.

CHAPTER VI

MUNICIPAL OWNERSHIP OF PUBLIC UTILITIES

The term "public utility" has not received any considerable amount of definition at the hands of the American courts. In the state of Oklahoma, however, where this term is employed in the constitution of 1908, the courts have been called upon to give it some precision of meaning. It has been held that the term "public utility" is synonymous with the term "public use;" such things, therefore, as sewers,[1] convention halls,[2] public parks,[3] and fire departments [4] have been declared to be public utilities. Defined in this manner it seems obvious that the term in question loses practically all of its distinctive meaning. Any and every function undertaken by a city could be gathered under its expansive wings.

What is a public utility?

It seems certain that the popular concept of the term "public utility" is not in harmony with the views of the supreme court of Oklahoma. It may be difficult to define the term with exactness, but it has unquestionably

[1] State *ex rel.* Edwards *v.* Millar, 21 Okla. 448 (1908).

[2] State *ex rel.* Manhattan Construction Co. *v.* Barnes, 22 Okla. 191 (1908).

[3] City of Ardmore *v.* State *ex rel.* Best, 24 Okla. 862 (1909); Barnes *v.* Hill, 23 Okla. 207 (1909).

[4] Coleman *v.* Frame, 26 Okla. 193 (1910); Oklahoma City *v.* State, *ex rel.* Edwards, 28 Okla. 780 (1911).

been associated with those functions which necessitate the making of such peculiar uses of the public highways or waters as to require (if privately owned and operated) a grant of special privilege from the government, or with functions in which, because of their monopolistic or quasi-monopolistic character, the public has a peculiar interest. One or both of these elements certainly enters into the meaning of the term "public utility" as it is commonly understood and employed. There is no doubt, also, that the method by which certain municipal functions are financed has considerable influence in determining the general concept of the term. From the viewpoint of economic theory it may be that a payment for gas or water is a private price when it is made to a private corporation, but is a fee (and, therefore, more nearly assimilable to a tax) when it is made directly to a city that owns and operates its waterworks or gas works.[5] However this may be, it is difficult to make either the courts or the public understand that there is any substantial difference in the character of these two payments. If a city owning a waterworks should decide to supply water without charge to the consumer in proportion to his measurable special benefit, and to finance this undertaking by general taxation, there is little doubt that the business of supplying water would in the popular mind cease to be regarded as a public utility. In other words, it is usual to include within the category of public utilities only that group of enterprises which may, under special allowance by the government, be undertaken by private persons for profit or which may

[5] For a discussion of the economic theories involved see Seligman, *Essays in Taxation*, ch. IX.

be undertaken by the government itself and financed by means of charges imposed upon consumers in proportion to benefit.

In recent years the term "public utility" has received statutory or constitutional definition in a number of states. These legislative definitions are invariably formulated in line with the popular concept of the term as indicated. For example, the public utilities law of Wisconsin defines a public utility as "every corporation, company, individual, association of individuals . . . and every town, village or city that now or hereafter may own, operate, manage or control any plant or equipment . . . for the conveyance of telephone messages or for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public."[6] To declare that a utility is a person is, perhaps, an interesting example of legislative license in the matter of the English language; but this law certainly leaves no doubt as to kind of business which the legislature had in mind. A recent amendment to the constitution of California refers to public utilities as "public works" for supplying the inhabitants of cities with "light, water, power, heat, transportation, telephone service or other means of communication."[7] Here again there is no uncertainty as to the character of the functions intended. Even in Oklahoma the statutory definition of the term "public utility" is far more nearly in line with the commonly accepted meaning of that term than the definition that has been given by the courts of that

[6] Laws of Wisconsin, 1909, ch. 499, sec. 1.

[7] Art. XI, sec. 19, adopted in 1911.

state.[8] Indeed, it seems safe to conclude that, generally speaking, the legal conception of what is and what is not a public utility is fairly in accord with the popular conception of what the term connotes.

The "municipal purpose" bogy

We have already had occasion to refer to those general rules of our law which assert that taxes may not be imposed and the power of eminent domain may not be exercised for other than a public purpose.[9] A number of our state constitutions also expressly declare or clearly imply that cities may be granted the power to levy taxes only for "municipal" or "corporate" purposes.[10] While the distinction between "public purpose" and "municipal purpose" has apparently not been much discussed by the courts, it is manifest that the former, although more comprehensive, is completely inclusive of the latter. Every municipal purpose is a *local* public purpose; but there are probably public purposes which are not regarded as local and, therefore, are not municipal.[11]

There are a considerable number of cases in the books involving the question of whether taxes imposed for the

[8] Laws of Oklahoma, 1907, p. 190, sec. 3.

[9] *Supra*, ch. V.

[10] *Index Digest of State Constitutions*, p. 1395 ff.

[11] At the same time it should be noted that this contention has seldom been raised. For example, education is commonly regarded as of state rather than of local concern; but it has probably never been urged that a city may not be authorized or compelled to impose taxes for this purpose on the ground that it is not a municipal purpose within the meaning of the constitutional clauses here under consideration. On this point see McBain, *Due Process of Law and the Power of the Legislature to Compel a Municipal Corporation to Levy a Tax or Incur a Debt for a Strictly Local Purpose*, in 14 *Columbia Law Review*, 407–409.

acquisition of this or that public utility are or are not taxes levied for a municipal purpose. It seems unnecessary, however, to review these cases. As might be expected, the courts have almost universally held that the ownership of a public utility by a city is a municipal purpose.[12] Indeed, it is difficult to comprehend how the contrary contention could be seriously put forward in modern times.

Municipal ownership under constitutional sanction

There is a common impression abroad in the United States that the powers which cities enjoy to own and operate public utilities are very narrowly limited by law. While there are, of course, considerable variations in respect to this matter, it is nevertheless true that, so far as naked legal power is concerned, many cities enjoy a wide margin of unexercised competence in this regard. In such cases the failure of the city to own and operate is due either to an absence of local sentiment in favor of public ownership, which in turn may result from one or more of several causes, or to the existence of legal and practical restrictions and complications which, even if they are not insuperable, as they sometimes are, are yet sufficiently formidable to render the prospect of public ownership unattractive and discouraging.

As far back as 1857 there was incorporated in the constitution of Iowa a provision limiting in proportion to the assessed valuation of taxable property within any city the amount of indebtedness which such city might incur. Somewhat similar provisions were thereafter

[12] For a discussion of some of the cases in point see Pond, *Public Utilities*, ch. IV. and *passim*.

incorporated into a large number of state constitutions.[13] Many of these provisions recognized, however, that a distinction should be drawn between indebtedness for general purposes and indebtedness incurred in connection with the construction or acquisition of public utilities. This distinction is based upon the difference, already referred to, in the manner in which public utilities are commonly financed. So long as the general property tax constitutes the principal source of municipal revenue for general purposes, there exists an obvious relation between the problem of municipal indebtedness and the taxable value of private property within the city. But as a rule, municipally owned utilities are at least approximately self-sustaining. If it be assumed that the fees charged by the city for such utility services are sufficient in amount not only to pay for maintenance and operation but also to liquidate indebtedness incurred for outlay, there is no relation whatever between utility debts and private property values. Upon this assumption—which, it may be remarked, has not always been fully justified by experience—many constitutions exempt from the debt limits which they impose upon cities the amount of indebtedness incurred either for one or more specified utilities or for public utilities and revenue producing enterprises generally.[14]

Constitutional provisions of this kind do not in point of fact actually grant to cities any powers of municipal ownership of utilities. They merely regulate matters pertaining to indebtedness in case the legislature should

[13] McBain, *The Law and the Practice of Municipal Home Rule*, pp. 53, 54.

[14] *Index Digest of State Constitutions*, pp. 126–136. In some instances the debt limit is simply increased for such purposes.

authorize such ownership. Within recent years, however, there has been a growing tendency to confer upon cities by constitutional provision broad grants of power to own and operate public utilities. Thus by an amendment to the Colorado constitution adopted in 1902, the city of Denver was authorized to own and operate "waterworks, light plants, power plants, transportation systems, heating plants, and any other public utilities."[15] So under the Michigan constitution of 1908 every city and village is directly empowered to "acquire, own and operate, either within or without its corporate limits, public utilities for supplying water, light, heat, power and transportation to the municipality and the inhabitants thereof."[16] This apparently generous grant is, however, stripped of most of its possibilities by the proviso that all mortgage bonds issued beyond the general limit of the city's bonded indebtedness shall be "secured only upon the property and revenues" of the public utility in question.[17] A similar proviso cripples the force of the Ohio constitutional amendment of 1912 by which every municipality of the state is authorized to "acquire, construct, own, lease and operate, within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants."[18]

As a matter of reason it may well be argued that if the city is permitted to incur indebtedness for utility

[15] Art. XX, sec. 1.

[16] Art. VIII, sec. 23.

[17] Art. VIII, sec. 24. See Attorney General *ex rel.* Hudson *v.* Common Council of Detroit, 164 Mich. 369 (1911); Attorney General *ex rel.* Barbour *v.* Lindsay, 178 Mich. 524 (1914).

[18] Art. XVIII, secs. 4, 12.

purposes beyond the limit that is fixed in proportion to taxable values, such excess indebtedness should be secured not against the general credit of the city, which rests upon the solid foundation of taxable values, but only upon the property and revenues of the utility for which the indebtedness is assumed. As a matter of practice, however, it will probably be very nearly impossible for any city to float an issue of bonds on this basis, except, perhaps, at very high interest rates. The reputation of cities for businesslike management is not such as to commend itself to investors as such. Indeed, the ready marketableness of municipal bonds at comparatively low rates of interest results almost wholly from the fact that enormous values may be tapped for the liquidation of these bonds by the exercise of the power of taxation.

Under the Oklahoma constitution of 1908, which was closely copied in this respect by the Arizona constitution of 1912, cities are allowed to become indebted "for the purchasing or constructing of public utilities" with the approval of a majority vote of the property tax-paying voters. Debts for this purpose are not included within the general municipal debt limit established by the constitution.[19] In California, by an amendment adopted in 1911, every municipal corporation is empowered to "establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication."[20] This power was expressly granted in spite of the fact that most of the cities of California

[19] Art. X, secs. 26, 27.
[20] Art. XI, sec. 19.

have exercised the constitutional power of framing and adopting their own charters, and in spite of the fact that the state supreme court had previously held that this power of home rule included the power to own and operate "any such necessary public utility as is generally owned and operated in a city by what is ordinarily known as a public service corporation, such as waterworks, gas or electric light works, street railways, etc."[21] In this state no absolute or proportionate debt limit is imposed upon cities by the constitution; there is in lieu thereof a requirement that there shall be a referendum upon every proposition to incur a debt in excess of annual income.[22]

Every one of these states which have conferred powers of municipal ownership by direct constitutional provision have also conferred upon cities general home rule powers. In framing and adopting its own charter, the city may make such provision as it chooses for the ownership and management of public utilities. Under other circumstances a power of ownership conferred directly by the constitution might in practice be of little avail; for it would be difficult to determine, in the absence of charter stipulation, what specific local authority could act for the city in the matter of acquiring, constructing, and operating any particular utility.

Municipal ownership under statutory sanction

It is simply a fact that nearly all the public utilities which are municipally owned in the United States have been acquired under authorization by the legislature,

[21] Platt *v.* San Francisco, 158 Cal. 74 (1910).
[22] Art. XI, sec. 18.

rather than by the state constitution. As we have had occasion to note, moreover, the courts have, on the whole, been more liberal than otherwise in their construction of the charter powers of cities in this respect. More than one city has been permitted to own and operate a public utility under an implied—and sometimes only a vaguely implied—competence.[23] Because of wide variations and the infinity of details, it is impossible to describe in general terms the present status of the charters and statutes governing the powers of cities in this respect. A few points of interest may, however, be noted.

It is easy enough to point to numerous statutes and constitutional provisions which confer upon cities more or less broad powers to own and operate public utilities; but the actual utility situation in most sizeable cities is highly complicated. It is not as if the streets of the city, which are indispensably bound up in the utility problem, were virgin soil. On the contrary, they are already largely occupied; and the opportunities of the city to enter the field as an owner and operator depend largely, if not entirely, upon the terms and conditions of this existing occupancy. Where there is no lack of statutory or constitutional authorization, and where the city desires to embark upon public ownership, what, then, are the more usual opportunities that are available?

There is, in the first place, an opportunity to occupy such parts of the utility field as are not already occupied by private companies, not as a competitor of such companies but as a supplementer. A street railway company is usually limited to a specified traction route and

[23] *Supra*, 44–48.

a water company or gas company may be confined to territorial limits narrower than those of the city itself. In such cases the city may embark upon municipal ownership and operation by preempting the unoccupied field. It is obvious, however, that this merely opens to the city the least attractive and potentially the least profitable part of the field. Municipal ownership in the outlying and sparsely settled districts of a city might be justified as a policy adopted in the interest of affecting the housing situation by the development of unimproved sections; but it ought to be recognized that, if undertaken for such a purpose, immediate financial success would be highly improbable. The principal difficulty, aside from that of finance, is that utilities (and especially transportation, which would be of prime importance in such a scheme) cannot always be segregated into district units. Consolidation of connecting units, as well as of competing units, has been one of the principal characteristics of utility development in this country; and the reasons for the consolidation of connecting units are so obvious as to require no discussion. On the whole, therefore, it can scarcely be said that the opportunity for noncompetitive municipal ownership in areas unoccupied by utility companies is either very large or very tempting.

Not infrequently, however, the oportunity is open to the city to enter into active competition with existing utility companies. Of course, there are many instances in which private utility corporations have been granted *exclusive* franchise rights. In such instances the city is powerless to invade these rights under a subsequently conferred power of ownership. The obligation of exist-

ing contracts cannot be impaired. If the exclusive franchise is of limited duration, the city can only bide its termination. If the franchise is in perpetuity, the city is, so far as the law is concerned, forever debarred from encroachment, except, perhaps, by the process of condemnation.[24] There are in existence in American cities many exclusive franchises and some of them are both irrevocable and unlimited as to duration.

The courts, however, prompted by the lead of the United States Supreme Court in a famous case [25] decided in 1837 have adopted and applied a rule of very strict construction in the matter of exclusive franchises. A person (or corporation) must show that the exclusiveness of his franchise was granted in express and unmistakable terms; nothing will be taken for granted by general implication. Moreover, as has been noted,[26] the city itself will not be held to have the power to grant an exclusive franchise unless such power has been expressly delegated. "Such power," says the highest court of the land, "must be given in language explicit and express, or necessarily implied from other powers." There are obvious reasons which, in the absence of the clearest intention, "insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."[27]

More especially is this true where the city itself seeks to enter into competition with a private corporation

[24] *Infra*, 170.

[25] Charles River Bridge *v.* Warren Bridge, 11 Peters 420 (1837).

[26] *Supra*, 42.

[27] Detroit Citizens' Street R. Co. *v.* Detroit Ry., 171 U. S. 48 (1898).

which, without being able to show express grant of authority, puts forward the contention that it enjoys an exclusive franchise right. The Supreme Court of the United States has expressed itself unequivocally upon this point. For example, the city of Knoxville, Tennessee, in granting a water franchise to a private corporation, had expressly agreed "not to grant to any other person or corporation, any contract or privilege to furnish water to the city of Knoxville, or the privilege of erecting upon the public streets, lanes, or alleys or other public grounds for the purpose of furnishing said city or the inhabitants thereof with water for the full period of thirty years from the first day of August, A.D. 1883." Before the expiration of the thirty years, however, the city decided to construct its own waterworks. Strictly construing the contract into which the city had entered with the waterworks company, the Supreme Court held that "the stipulation in the agreement that the city would not, at any time during the thirty years commencing August 1, 1883, grant to any person or corporation the same privileges it had given to the water company, was by no means an agreement that it would never during that period construct and maintain waterworks of its own."[28] Although this might "bring hardship and loss to the water company and to those having an interest in its property and bonds," the view was expressed that "the court should adhere firmly to the salutary doctrine underlying the whole law of municipal corporations and the doctrines of the adjudicated cases, that grants of special privileges affecting the general in-

[28] Knoxville Water Company *v.* Knoxville, 200 U. S. 22 (1905). Four justices dissented.

terests are to be liberally construed in favor of the public, and that no public body, charged with public duties be held upon mere implication or presumption to have divested itself of its powers."

In a recent case[29] involving an attempt on the part of a city to establish a waterworks in competition with a plant owned and operated by a private company, it was pointed out that the city would be called upon to regulate the rates that might be charged by the private company and at the same time endeavor to make a success of the city works. Moreover, the private company was "called on to pay taxes to help its rival succeed." In answer to these points, the Supreme Court said:

It is impossible not to feel the force of the plaintiff's argument as a reason for interpreting the constitution [of California] so as to avoid the result, if it might be, but it comes too late. There is no pretense that there is any express promise to private adventurers that they shall not encounter subsequent municipal competition. We do not find any language that even encourages that hope, and the principles established in this class of cases forbid us to resort to the fiction that a promise is implied.

The constitutional possibility of such a ruinous competition is recognized in the cases, and is held not sufficient to justify the implication of a contract.[30] . . So strictly are private persons confined to the letter of their express grant that a contract by a city not to grant to any person or corporation the same privileges that it had given to the plaintiff was held not to preclude the city itself from building waterworks of its own[31] . . . As there is no contract the plaintiff stands legally in the same position as if the constitution

[29] Madera Waterworks *v.* City of Madera, 228 U. S. 454 (1913).

[30] Citing Hamilton Gas Light and Coke Co. *v.* Hamilton, 146 U. S. 258 (1892); Joplin *v.* Southwest Missouri Light Co., 191 U. S. 150 (1903); Helena Waterworks Co. *v.* Helena, 195 U. S. 383 (1904).

[31] Citing Knoxville Water Company *v.* Knoxville, 200 U. S. 22 (1905), and Vicksburg *v.* Vicksburg Waterworks Company, 202 U. S. 453 (1905).

had given express warning of what the city might do. It is left to depend upon the sense of justice that the city may show.

In the light of such opinions as this, it may be taken as settled that the field of competition lies open to the city unless it has been bartered away in the most specific terms. Occasionally, as in the case of the New York subways, which are municipally built though privately operated, a city actually enters into competition with existing utility companies.[32] It is a fact, however, that not many cities have done this. They have far more usually, where they enjoyed the power to do so, used the threat of public competition to secure adequate compliance with the terms of franchise agreements or to secure *addenda* concessions to such agreements in the interest of the public. To these ends potential competition by the city itself has been a powerful weapon in the hands of municipal authorities—a weapon which has, of course, been capable of improper as well as of proper uses.

In this connection a few words in respect to the general subject of competition in public utility services may not be inappropriate. Time was when, in the effort to secure adequate rates and service from utility corporations, chief reliance was placed upon the operation of the usual economic laws of competition. For a number of reasons, however, competition for this purpose proved largely a failure.[33] It failed even in the

[32] The Rapid Transit Acts, by which the power to construct subways was granted to the city, were contested in Sun Printing and Publishing Association *v.* Mayor etc. of New York, 152 N. Y. 257 (1897), chiefly on the ground that money spent for this purpose was not for a "city purpose." *Supra*, 156.

[33] Wilcox, *Municipal Franchises*, I, pp. 123–126 and *passim*.

case of those utilities, such as electric light, in which the physical possibilities of competition were largest. It is true that some elements of competition still survive in the matter of municipal utilities; but, generally speaking, monopoly under municipal ownership or monopoly under private ownership subject to public regulation have come to be recognized as more or less inevitable if not actually indispensable.

Where conditions exist that call loudly for service in addition to that which is being or can be furnished by existing utility companies, cities have occasionally entered the field of competition with no intention of destroying the business of these companies or even of compelling them to supply better service or to reduce rates. This was notably true in the case of the New York subways. More usually, however, where a city has the statutory power to enter into competition with a privately owned public utility and where this power is exercised, the enterprise is undertaken for quite different purposes. It is commonly an enterprise of last resort. The city, having the resource of general taxation that is unavailable to the private corporation, may operate indefinitely at a loss. Its competitors, therefore, are very unevenly matched against it. The odds are so greatly in favor of the city that, having once launched its enterprise, there can be no doubt of the result. Ultimately the privately owned utility must either capitulate at the city's terms or suffer itself to be utterly annihilated with a show of heroism that is not usually associated with transactions involving considerations of a wholly material character. In other words, when the city enters it enters to conquer and not

to play the rôle either of a supplementer or of a mere economic adjuster. In the case of utilities that use the subsurfaces or supersurfaces of streets this is manifest. With ordinary street railways, however, with which we in the United States have had little experience in the matter of public as opposed to private competition, the situation is somewhat modified by physical circumstances. Even where the city is not legally barred from competition by reason of wholly exclusive grants to private corporations in designated streets, it may find itself greatly handicapped by the fact that the most available streets are already occupied by tracks while their capacity for carrying tracks is manifestly limited.

The competence of this or that city to enter the field of competition with private utility corporations has for the most part been the result of inadvertence rather than of design. The city has usually stumbled upon its competence in the course of a struggle toward better utility conditions. The right of the city to compete has rarely, if ever, been *expressly* recognized in a franchise agreement. It has found its origin chiefly in the absence of express stipulations to the contrary. In recently granted franchises of the more approved form, the conflict between the right of the city to be served adequately and charged reasonably and of the utility corporation to earn an income regardless of public considerations has been more squarely met. Specific provision has been made in respect to the rights of the city to take over the utility in question at any time or at specified dates or at the termination of the franchise. Provisions of this kind have, of course, varied; but except in cases in which the city has made extraordinary

financial concessions or those in which a scheme of amortization has been provied, they have usually embodied the requirement that the city shall pay for the property of the company at an appraised valuation, in which, however, the value of the franchise as such shall not be included. Under such agreements municipal competition is effectually excluded. It should be remarked, moreover, that the efficacy of such agreements depends upon whether the utility covered by the franchise can be successfully operated as an independent unit. If the franchise is only a link in a chain of interdependent franchises, it is obvious that the reservation of a right to take over this link is at best only a half-way measure.

Acquisition by eminent domain

The power of eminent domain is sometimes conferred upon cities only for a specified list of purposes. Often, however, it is conferred generally for any public purpose. Even in private hands a public utility is regarded as a business operated for a public purpose; and the power of eminent domain is often granted to the private owner. Is it possible, then, for a city which has the constitutional or statutory power to own utilities to secure possession of privately owned utilities by condemnation proceedings under the power of eminent domain? The law upon this subject is firmly settled in favor of the competence of the city. Thus the New York court of appeals, in a case involving the condemnation of a waterworks by the city of Brooklyn, sustained the validity of such a proceeding by the following course of reasoning: [34]

[34] *In re* City of Brooklyn, 143 N. Y., 596 (1894).

While the purpose of the waterworks company was public in its nature, it cannot be said to be strictly identical with the municipal purpose. A municipal corporation is a public and governmental agency. It holds property for the general benefit, with a larger scope of use. When acquired by the municipality of Brooklyn, the appellant's property would become a part of a general system, under a single management, and conducted essentially as a public work. If, in order the better to serve the public use, the appropriation of private property is necessary, even though it be already devoted to a similar use, the right to make it is incident to the legislative power, and it is necessary for the general good that the right be conceded. All property within the state is subject to the right of the legislature to appropriate it for necessary and reasonable public use, upon a just compensation being provided to be made therefor, and there can be no distinction in favor of corporations whose franchises and operations impart to them a quasi-public character. We think it very apparent that the public use to which the appellant's property is to be devoted by the provisions of the act does differ, and that it is of a higher and wider scope.

This view was sustained by the United States Supreme Court when the case went forward upon a writ of error.[35] To the argument that the superiority of the public purpose of the city over against that of the private corporation could be sustained only if the city furnished water without charge to the inhabitants, the court replied:

That the supply of water to a city is a public purpose cannot be doubted, and hence the condemnation of a water supply system must be recognized as within the unquestioned limits of the power of eminent domain. . . . The state, which, in the first place, has the power to construct a water supply system and charge individuals for the use of water, may condemn a system already constructed, and continue to make such charge. This is not turning property from one private corporation to another, but taking property from a private corporation and vesting the title in some municipal corporation for the public use. It is not essential to a public use that it be absolutely free and without any charge to any one.

[35] Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685 (1897).

In spite of the firm establishment of the law upon this point it is nevertheless a fact that few cities have acquired utilities by the process of condemnation. This has been due in part no doubt to the novelty of such an enterprise as well as to uncertainty as to whether the power of eminent domain, when granted for general public purposes, could be used for this specific purpose,[36] although it is difficult to see why it might not be so used under such a grant. Further than this, it is a fact of common knowledge that the city pays dearly indeed even for the real property which it acquires by condemnation proceedings. When it is considered that the acquirement of a public utility by this means involves the condemnation not only of real and personal property but also of a business, including the easily swollen elements of franchise value and other intangibles,[37] it is needless to say that the average American city, consulting the book of experience, would hesitate before it plunged into a project from which it might find difficulty in drawing back.

Within comparatively recent years the body of case law dealing with the subject of public utilities has, like the body of statute law, increased to enormous volume. Many of the rules that have been laid down with reference to privately owned utilities have been applied with little discrimination to municipally owned utilities. To discuss all of the important rules relating to municipal

[36] In the Brooklyn case the power was conferred by statute for this specific proceeding.

[37] It is true, of course, that intangibles are sometimes allowed even in the ordinary condemnation of real property. See, for example, *In re* Board of Water Supply of New York, 211 N. Y. 174 (1914).

ownership would lead us far into the broad general field of public utilities law. Such an extended excursion is quite impossible here. So far as control by the state is concerned, which is the chief of the modern developments in the utility field, it is sufficient to say that from the strictly legal viewpoint the city as a utility owner is decidedly at a disadvantage when compared with the private owner. The competence of the state to control the city in such matters is referable not only to the nature of the business, but also to the nature of the owner, the city being a "subordinate political division of the state." Its right to own is not an inviolable contract with the state; and although in a few states the city and the private owner have been placed in the same category with respect to control by a state commission, the case has probably never arisen in which a city has invoked the guaranty of due process of law to sustain its rates or to defeat imposed requirements as to service. It is true that in the vast majority of instances the state has not attempted to control the city in such matters to any considerable extent. It has properly left the protection of the consuming public's interests to the city itself. But the point remains that so far as the law goes the city could probably find no general constitutional protection against legislative compulsion of free service or of utterly extravagant service should the legislature attempt to exert its power in this regard.

Perhaps the principal legal advantage which the city enjoys over against the private owner of a utility in the matter of state control lies in its usual freedom from state taxation. Into this phase of the law, however, we cannot here enter.

CHAPTER VII

CONTROL OVER LIVING COSTS

There are, of course, many economic factors that enter into the determination of prices, and some of these are certainly subject to control or influence by the government. Combinations in restraint of trade and unfair methods of competition were illegal at common law, and in recent years have been subjected to statutory control under the police power of the states and the commerce power of Congress. Frauds in the use of weights and measures or in the misbranding or adulteration of commodities are likewise sought to be prevented. One of the earliest functions of cities was the maintenance of markets—a function which, in theory, at least—has an effect upon prices. So also the activity of the government in supplying adequate port and terminal facilities ought to affect that large element of price which is chargeable to the cost of transportation.

But apart from these and perhaps a few other points at which the government may exercise an influence upon price factors, there are doubtless only two conceivable methods of direct control. One of these is the fixing of maximum prices that may be charged; the other is government ownership and operation of the business sought to be controlled. The principal question before us, therefore, is: to what extent, under our constitutional system, may the government regulate

business prices or actively enter into the field of business?

Early regulation of prices

Those who are unacquainted with the historical development of municipal functions in the United States may be surprised to learn that time was when cities exercised a far-reaching measure of control over what we now regard as private business and especially over the business of purveying foods. During the colonial period, for example, the only persons who were permitted to carry on practically any kind of business within a city were the so-called freemen, who were admitted to their privileges by a vote of the common council upon the payment of a fee. In other words, it was within the undoubted *power* of the council, however little that power may have been abused, to create a general legal monopoly of business within the city. But the early city went further than this—it fixed the exact maximum price at which certain commodities might be sold. In colonial New York, for instance, it was customary to regulate with great strictness not only the quality and the size of a loaf of bread, but also the price at which it might be offered for sale. Such regulations were varied from time to time in accordance with the market price of wheat; and inspectors were appointed to see that the regulations were complied with. Incidentally, it is interesting to note that in 1741 the bakers of New York City went out on a strike because of the low price that was fixed by the council; and the records of the city disclose that this concerted action "reduced some, notwithstanding their

Riches, to a sudden want of Bread." [1] The earliest instance of a regulation of the price of meats by the common council of New York seems to have been in 1763. This regulation was bitterly opposed both by the butchers and the farmers, but an effort to get the colonial assembly to nullify the city ordinance was defeated. In the end, the council modified its regulation; but during the entire controversy, the competence of the city to enact such an ordinance seems not to have been questioned. The city also fixed the scale of prices at which wines, liquors, and beers might be sold.

The early policy of the city of New York in the matter of regulating the sale of comestibles was also closely connected with its market system, to which reference will be made a little later. It is sufficient to note at this point that, with the exception of bread and liquors, all foodstuffs were specifically required by ordinance to be vended only at the public markets.

Development of the law governing price regulation

In the light of the modern conception of municipal functions in this regard, and more especially in the light of modern legal principles, it is highly important to note that circumstances have in the course of time brought about changes of profound signification. It is impossible to trace here, even in outline, the development of English and American law governing the relation between government and business. It is a long step from the medieval organization of industry, founded almost wholly upon the principle of legalized and regulated monopoly, to the modern industrial organization, based

[1] *Journal of the Common Council*, April 20, 1741.

largely upon the principle of unregulated competition. Between these two lies a stretch of centuries during which philosophies of government as reflected in the principles of the law were undergoing a far-reaching but almost imperceptibly gradual change.[2]

The winning of our independence from Great Britain was accompanied and followed by the adoption of written constitutions containing declarations of individual rights over against the powers of the government. It is entirely erroneous to suppose that these strokes of the pen resulted in a sudden break in the law, in the immediate overthrow of an old economic order and an over-night establishment of a new order. The principle of competition in trades and industries had been gaining ground long before the Revolution fell. In the early part of the nineteenth century it came to furnish the very foundation of our industrial organization. This was probably due, however, far more largely to the wide acceptance of the doctrines of individualism and of *laissez faire* in matters political than to actual protection extended by the courts under the constitutional guaranties in behalf of liberty and of property. Within the last fifty years we have again been moving in the direction of regulating freedom of competition, and the aid of courts has been repeatedly invoked to protect the individual against such interference by the government. It is especially in this later period that the scope of our constitutional limitations upon the government's power to regulate has been unfolded.

Now it is simply a fact that both the courts and the commentators have, in an effort to establish the con-

[2] Beale and Wyman, *Railroad Rate Regulation*, 2d ed., ch. I.

tinuity of the law, relied for support upon the practices which were pursued and the principles of law which were applied in the era that antedated the establishment of our constitutional system. Thus in the leading modern case upon this subject,[3] decided in 1877, the United States Supreme Court said:

> It has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the states upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property.

It is submitted, nevertheless, that if the principles to be applied in the determination of the power of the government to regulate business prices and service are to be found in immemorial custom, the court must be prepared to sustain regulation of a far more extensive character than that which has been attempted in modern times. The court did not intend in this opinion to express the view that the government enjoyed the power to regulate prices in any and every trade or calling. It was only business affected with a peculiar public interest that could be so regulated. It was evidently the opinion of the court, although the point was not specifically made, that the customary regulation of the trades enumerated was and always had been founded upon the fact that they belonged in this category of business. Indeed, in a later case involving

[3] Munn *v.* Illinois, 94 U. S. 113 (1877).

precisely the same question[4] the court expressly declared that "while no general power resided in the legislature to regulate private business, prescribe the conditions under which it should be conducted, fix the price of commodities and services, or interfere with freedom of contract, and while merchant, manufacturer, artisan, and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammeled by burdensome and restrictive regulations, which, however common in rude and irregular times, are inconsistent with constitutional liberty, yet there might be special conditions and circumstances which brought the business . . . within principles which, by the common law and the practice of free governments, justified legislative control and regulation in the particular case."[5]

In other words, it was the view of the court that some businesses are to be regarded as public and others as private, and that now, as formerly, the power of the government to regulate prices and services extends to the former but not to the latter. From the historical viewpoint it is open to serious question whether the regulatory power of the government as exercised over business in earlier times rested upon any such conception. A recent commentator[6] has attempted to show not only that the distinction between public and private business "has not been helpful in practice," and is "theo-

[4] Budd *v.* New York, 143 U. S. 517 (1892).

[5] This was part of a paraphrase of the opinion of the New York court of appeals in People *v.* Budd, 117 N. Y. 1 (1889), which the United States Supreme Court made and declared to be "sound and just."

[6] Edward A. Alder, *Business Jurisprudence*, in 28 *Harvard Law Review*, p. 135.

retically unsound," but also that it is "the result of a misconstruction of the cases upon which it purports to rest as well as of the overlooking of material evidence." He argues with much force that, in consideration of the extensive list of employments that were formerly described as "common" occupations, the term" common" cannot properly be regarded as synonymous with "public," as it has been in the case of common carriers, and that no evidence whatever has been produced to show that the businesses or "common" employments which were formerly subject to special control by the law had in fact any "*exceptional* relation to the public."[7]

While it is probably true that the regulatory powers formerly exercised by the government over many kinds of business were not based wholly upon the character of the business but were rather in the nature of survivals from the era of mercantilism, when industry was almost completely organized upon the basis of regulated and

[7] In respect to the argument sometimes advanced that this exceptional relation to the public arose out of monopoly, and that economic changes in this respect account for the disappearance of many trades from the list of those subject to regulation he says: "When we consider the principle of monopoly as producing in the early days the supposed distinction between classes of callings, its failure is clearly apparent, for no evidence of any kind is offered that carriers were less numerous than butchers, or that innkeepers were fewer than carpenters, or barbers than weavers. Tailors were no less numerous than fullers, so far as the evidence goes, and they were, in 1400, numerous enough in Beverley to have a guild of their own. So were the barbers and surgeons, and it is noteworthy that the guild at that time provided for a tax upon itinerant surgeons who were in the town over eight days. Monopoly, therefore, cannot be accepted as an explanation of the distinction between public and private callings, either at present or in the distant past, for it does not explain the distinctions within a calling or account for the difference supposed formerly to exist between such tradespeople as innkeepers and tailors, and such as carpenters and brewers, and it fails to account for the present-day difference in the treatment of a city hotel, struggling under competition, and a coal company absolutely controlling the coal supply of a city or state."

legalized monopoly, it cannot be too greatly emphasized that the courts do not accept this view. On the contrary, they hold that the principles now applied in determining the power of the government to regulate are identical with the old principles of the common law. As one commentator has expressed it:[8]

> The common law persists from age to age, and though the instance of its rules may be seen to change as old conditions pass away and new conditions arise, its fundamental principles remain. . . Barber, surgeon, smith, and tailor are no longer in common calling because the situation in the modern times does not require it; but innkeeper, carrier, ferryman and wharfinger are still in that classification, since even in modern business the conditions require them to be so treated. With changed economic conditions in modern times new callings have come into being with such potentialities that this special law has been utilized as never before in regulating them. Indeed, from the point of view of one who believes in our common law, the class of public callings is capable of indefinite extension whenever new conditions bring new employments within its scope. And in all times our law has held to the principles that this peculiar regulation was necessary in certain kinds of business. It depends largely upon the opinion current at the time how far this law shall be extended.

There is no question that this attempt to establish an identity between the principles of modern and of ancient regulation of business has led to confusion and uncertainty, as well as to some obvious contradiction. For example, as we have seen, the highest tribunal of the land mentioned the baking business among the trades which have been "from time immemorial" subject to regulation and price-fixing. Moreover, an Alabama case upon this subject, decided in 1841, was cited with ap-

[8] Beale and Wyman, *Railroad Rate Regulation*, 2d ed., p. 11.

proval. This case[9] involved the validity of a municipal ordinance regulating the weight and price of bread—an ordinance which was not at all comparable to the modern municipal ordinances which require, as a protection against fraud, that the weight of a loaf of bread shall be stamped upon it. Referring generally to the power of the government to regulate individual liberty and private property where the public interest is concerned, the Alabama court said:

> Where a great number of persons are collected together in a town or city, a regular supply of wholesome bread is a matter of the utmost importance; and whatever doubts may have been thrown over the question by the theories of political economists, it would seem that experience has shown that this great end is better secured by licensing a sufficient number of bakers and by an assize of bread, than by leaving it to the voluntary acts of individuals. By this means a constant supply is obtained without that fluctuation in quantity which would be the inevitable result of throwing the trade entirely open, and the consequent rise in price, when from accident or design a sufficient supply was not produced. The interest of the city in always having an abundant supply will be a sufficient guaranty against any abuse of the right to regulate the weight, the consequence of which would be to drive the baker from the trade. . . . The legislature having full power to pass such laws as is deemed necessary for the public good, their acts cannot be impeached on the ground, that they are unwise, or not in accordance with just and enlightened views of political economy, as understood at the present day. The laws against usury, and quarantine, and other sanitary regulations, are by many considered as most vexatious and improper restraints on trade and commerce, but so long as they remain in force, must be enforced by courts of justice; arguments against their policy must be addressed to the legislative department of the government.

The argument thus advanced is, of course, not without force; but it must be recognized that, since "man

[9] Mayor and Aldermen of Mobile *v.* Yuille, 3 Ala. 137 (1841).

does not live by bread alone," it could be applied with equal force to numerous other trades and industries. In this connection it is of interest to note that, although the United States Supreme Court approved this Alabama decision, the same court at a later date held void a law of New York regulating the hours of labor in the baking business,[10] which was classed among the "ordinary trades and occupations of the people." Moreover, in a still later case,[11] sustaining the validity of a Chicago ordinance regulating the sizes of loaves of bread that might be sold, the court was careful to point out that the council "had not fixed the price at which bread might be sold;" and there was no intimation that this might have been done and no reference to the "immemorial practice" with respect to the baking trade.

What is a "public" business?

In spite of the degree of confusion and uncertainty in the law that have resulted from the attempt to maintain a continuity of thought and purpose between the old and the new principles of regulation, it must be taken as settled that prices and services may be regulated only for business that is affected with a peculiar public interest. The question, therefore, is: What are the facts or conditions that establish the public character of a business? This question cannot be answered by a rule of thumb.

[10] Lochner *v.* New York, 198 U. S. 45 (1904). Of course the points involved were not identical. It would seem, however, that if the baking business is of so peculiarly public a character as to justify price-fixing, it might certainly be regarded as sufficiently distinctive to require regulation of hours of labor.

[11] Schmidinger *v.* City of Chicago, 226 U. S. 578 (1912).

It is certain that all those lines of business that require a grant of special privilege from the government are within the category of public businesses. These include such lines of business as the usual public utilities[12]—water, gas, electric current, telephone and telegraph communication, railway and ferry transportation. Even cabmen, whose fares have for a long time been subject to regulation, fall within this class because of the special uses which they make of the streets for cabstands and the solicitation of trade. It is perfectly easy to comprehend that where a business necessitates a special privilege from the government, which means from the public, that business is of necessity affected with a peculiar public interest. And there is no question that this is the principal kind of business which is in modern times subjected to control in the matter of charges and service. When, however, we pass beyond this class of business, we emerge into uncertainty.

Is monopoly an element that establishes the public character of a business? At least three kinds of monopoly may be considered. There is, in the first place, natural monopoly, based upon exclusive control of a source or of access to a source of supply. There may, for example, in the case of this or that city be only one available source of water supply; but in the business of furnishing water there exists also the necessity of the special privilege. The fact is that absolute natural monopoly does not often exist; and it is impossible to assert whether or not, in the complete absence of any other element, the law would recognize this as a circumstance which established the public character of the

[12] *Supra*, ch. VI.

business. Certainly it is difficult to see how any circumstance could create a larger public interest than the existence of an unquestionable natural monopoly.

In the second place, there is monopoly in fact—that is, monopoly that exists merely because, although the field of competition is wide open, no competition in fact exists. Of this character is the single grocery store of the village; and indeed it is perfectly manifest that practically any kind of business might find itself in this situation in a community or part of a community in which it operated without actual competition. It may be argued with considerable force that under these circumstances the fear of competition is quite as strong as actual competition in securing adequate service at reasonable prices.[13] As a general rule this may be true, although it must be recognized that where the market is not large enough to support at least *two* competitors, the inducement to enter the field is slight.

It is simply a fact that the government has not often attempted to regulate prices and service because of the existence of monopolies based simply upon fact. Within this class of regulations, however, must doubtless be put a law of Illinois, enacted in 1871, which fixed the maximum rates that might be charged by grain ele-

[13] In a dissenting opinion read in Budd *v.* New York, 143 U. S. 517 (1892), Mr. Justice Brewer, omitting any reference to natural monopolies, said: "There are two kinds of monopoly; one of law, the other of fact . . . A monopoly of fact any one can break, and there is no necessity for legislative interference. It exists when any one by his money and labor furnishes facilities for business which no one else has. A man puts up in a city the only building suitable for offices. He has therefore a monopoly of that business; but it is a monopoly of fact, which any one can break who, with like business courage puts his means into a similar building. Because of the monopoly feature subject thus easily to be broken, may the legislature regulate the price at which he will lease his offices?"

vators through which most of the grain from the West and Northwest passed en route to the East. This law gave rise to the famous case of Munn *v.* Illinois,[14] to which reference has already been made. The court stood upon the general doctrine that "when the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use."[15] It was only necessary to determine whether the grain elevators in Chicago were property devoted to a use in which the public had an interest. By the following course of reasoning the court concluded that they belonged in this category:

> In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great states of the West" must pass on the way "to four or five of the states on the seashore" may be a "virtual" monopoly.

It was not alleged that the field of competition in grain elevators was not open to other competitors who

[14] 94 U. S. 113 (1877). Reaffirmed as to a similar law in New York in Budd *v.* New York, 143 U. S. 517 (1892).

[15] Quoted from the syllabus.

might charge lower rates. It was not alleged that the elevators were on the railways' rights of way and, therefore, shared in their special privileges granted by the government. So far as the annual rate agreement was concerned it is obvious that this could have been reached by an action brought against a combination or conspiracy in restraint of trade. Indeed, it seems clear the "virtual monopoly" which was held to exist here, if it was founded upon anything more substantial than an illegal conspiracy, was at best only a gigantic monopoly in fact. The logic of the case would seem to be that any monopoly in fact is a business affected with a public interest and is, therefore, subject to price and service regulation. It is, nevertheless, of interest to note that in the more than forty years since this decision was handed down, there has been scarcely any development of the policy of regulating business of this kind.[16] Certainly there is no instance in which a municipal corporation has attempted to regulate business upon this principle.

Finally must be mentioned those monopolies which are founded upon exclusive legal grants. Every such grant is a special privilege and there can be no question, therefore, of the power of the government to regulate the business of the grantee. Formerly, as has been noted, such monopolies were created in many lines of business. In modern times they are confined almost wholly to the so-called public utilities, it being recognized that, generally speaking, the results of regulated monopoly are, so far as the interests of the public are

[16] The so-called anti-trust legislation, which has not involved regulation of prices, is of a wholly different character.

concerned, superior to those of unregulated competition. Even where a public service corporation is not granted an *exclusive* privilege, but is subject to *possible* competition, it may for practical purposes be regarded as enjoying a legal monopoly so long as the government refuses or fails to grant any competitive franchise; for the opening of the field of competition in such cases depends upon a legal act. It is a matter of no practical consequence whether the public character of a so-called public utility is rested upon its special privilege or upon the fact that it is a natural, an actual, or a legal monopoly.

Whether the government, under our constitutional system, has the power to establish a legal monopoly in any line of business that it chooses is open to grave question. The authority to vest in a single corporation the exclusive power to slaughter cattle within a city has been sustained under the power to protect the public health;[17] and presumably this method of control might be extended to other trades and industries that are subject to regulation under the usual subjects of the police power. Sometimes, also, there is an element of monopoly in the granting of regulatory licenses, as where an absolute limit is set to the number of liquor licenses that may be issued in a city. But restrictions of this latter kind have been applied only to businesses that may be wholly prohibited under the police power. As a rule, a license must be issued to *any* applicant who satisfies the requirements of the law. The policy of legal monopoly, therefore, plays a very slight rôle even in the realm of the police power. As a means of

[17] Slaughter House Cases, 16 Wall. 36 (1872).

controlling prices and services in business generally it would be as doubtful of constitutionality as of propriety.

From this brief review it seems reasonable to conclude that the existence of monopoly in one or more of its various forms has been of little importance in determining the public character of a business except in the case of those businesses which, whether monopolistic or not, are in any case regarded as affected with a public interest because they require a grant of special privilege from the government.

Is there, then, any business which, although not requiring a special privilege and not entailing any element of monopoly, is nevertheless regarded as a public business? In the cases upon this subject it is customary to mention among the callings that are subject to control in the matter of prices and service the trades of innkeeper, miller, drayman, wharfinger, and perhaps one or two others. In point of fact the regulation that is now imposed upon these extends, where it applies at all, to nothing further than the obligation to serve all who come. Their charges are seldom, if ever, regulated in modern times; and even in the matter of obligation to serve there is a considerable element of fiction. In practice there are usually effective ways of avoiding this obligation in the rare instances in which it seems to be desirable to do so. Moreover, it does seem little short of ridiculous to stress the *obligation* to serve in a *few* lines of business when a perpetual struggle for an *opportunity* to serve lies at the foundation of *all* business, even though occasionally it be true that the rule of obligation is of some importance.

The regulation of the maximum rate of interest that may be charged has sometimes been cited as an instance of regulation of charges by the government; and such it undoubtedly is. It cannot be supported upon the principle either of a special privilege or of monopoly. The argument that the taking of interest was wholly prohibited by the ancient common law and that the later allowance of limited interest is, therefore, in the nature of a privilege is, however true historically, too attenuated to command general acceptance. Doubtless it ought to be freely admitted that this is at least one instance in which the police power of preventing economic oppression is exercised through the medium of price regulation; although on the same theory, it must be recognized, the price of any and every commodity or service could be made the subject of like control. In other words, here is a policy of regulation which, without being bolstered up by any theory of special privilege from the government or of monopoly, has survived to us unbroken from the era when such reasons for public regulation of business were unnecessary. It is certainly difficult to see, at least from the theoretical point of view, why it is any more necessary or advisable to fix the maximum charges at which money may be loaned under the usual competitive conditions of the money market than it is to fix the charges for any other competitive commodity or service.

On the whole, it seems fair to conclude that while the law on this subject, largely as a result of the attempt to identify the principles of ancient and of modern regulation, is in a state of considerable uncertainty, it is open to serious question whether, under our constitu-

tional system, a city could be empowered to regulate business prices generally in the interest of lowering the costs of living. It is probably because of this doubt that there appears to be no active agitation for the trial of this method of solving the problem of living costs. It may be that under the power to regulate interstate and foreign commerce Congress has the constitutional competence to fix the prices of all commodities that enter into such commerce. There has been no judicial determination upon this point for the reason that, except as a war measure, which must be wholly distinguished, Congress has never attempted to exercise such power. Even as a war measure it is open to grave doubt whether the states would be competent to fix prices generally or to delegate such authority to cities; the war power belongs to the national government, not to the states. Upon the theory of emergency, roughly comparable to the emergency which justifies the summary destruction of a building in the path of a sweeping fire or the exercise of almost unlimited powers by health officers in time of great danger, the fixing of prices by states and cities might perhaps be sustained in time of war or other serious calamity. But this is somewhat beside the point of our discussion.

So far as the law itself is concerned, in its relation to normal economic conditions, it would undoubtedly clarify the situation if the courts would frankly declare that the only business that is affected with a public interest (and is, therefore, subject to price regulation) is that which is operating under a grant of special privilege from the government; or, on the other hand, if they would return to the notion which seems probably to

have prevailed in earlier times—to wit, that all business which is offered to the public generally is public business and therefore subject to reasonable regulation. The first of these views would very nearly square the law with existing facts. The other would open up large opportunities for governmental control in cases where the economic laws of competition had apparently failed. The guaranty of due process of law would, of course, as now interpreted, operate to restrain the government from depriving the individual of the right to earn a reasonable income upon his investment. Whether our success in the field of regulating utility rates and service is sufficient to justify an extension of this practice to other lines of business is wholly a different question.

Municipal markets

Mention has been made of the fact that the establishment of public markets was one of the early functions of the city. In New York, for example, as far back as 1731, when a new charter was granted to the city by Governor Montgomerie, there were five municipal markets in operation. Originally these markets were leased by stalls, but after 1741 all the markets were leased to a single person, who in turn sublet the stalls. Occasionally during the eighteenth century the city was indicted for allowing "Dirt and Nastiness" in its markets; and in the case of the market maintained in the middle of Broadway near the present Liberty street, the city was sued for obstructing the street. Toward the end of the colonial period there was large dissatisfaction among the people and the market system

began to break down as a result of the council's opposition to the erection of new markets.

Public markets have survived to the present day in a considerable number of cities; and although they occupy places of varying importance from city to city, there is no city that relies in any large measure upon them in the matter of its food supply. In recent years interest in the whole subject of public markets, both retail and wholesale, has been revived; and numerous investigations and proposals have been made. Concerning the value of the public market and its relation to the cost of living, opinions do not agree. However, a discussion of this question and of the numerous interesting reports that have recently been made would take us far afield from our subject. We are dealing with the principles of the law; and there can be no shadow of doubt that the ownership and management of public markets is an entirely proper municipal function. Indeed it was early held in Massachusetts that, by reason of "long established and well settled usage," towns needed no specific grant of authority to erect market houses.[18]

What lines of business may the city enter?

Reference has previously been made to the general rule of our law which asserts that taxes may not be imposed for a private purpose. Since taxes are the principal source of municipal revenue in the United States, and since the general credit of the city, which rests upon the power of taxation, is usually behind one

[18] Spaulding *v.* City of Lowell, 23 Pick. (Mass.) 71 (1839).

and all of its activities, this rule has an important bearing upon the question of the competence of the state to empower cities to enter directly into the field of business with the end in view of lowering prices or bettering services. It is probable that a few cities have on occasions of apparent emergency actually bought and sold food. Moreover, after the entrance of the United States into the European war, one or two states expressly authorized cities to buy and sell food in time of emergency.[19] There is, however, no instance in which any American city has attempted, with or without statutory authorization, to adopt this as a permanent policy even on a small scale. As an emergency proposition it is certainly possible that the exercise of such a function might be sustained upon the theory mentioned above in connection with our discussion of price-fixing. But there appears to be no case which directly decides the question whether the buying and selling of food in any circumstance is or is not within the scope of the public purpose rule.

In respect to a few other lines of business, however, this question has been definitely considered. One of these is the coal and wood business. In 1892 the supreme court of Massachusetts was asked by the legislature whether it was within the constitutional power of the legislature to empower the cities and towns of the state to purchase and sell coal and wood for fuel. Re-

[19] Such laws were enacted at the regular session of the New Jersey legislature in 1917 and at a special session of the New York legislature in the same year. Section 14 of the New York law declared that "any municipality in this state may, in case of an actual or anticipated emergency on account of a deprivation of necessities, by reason of excessive charges or otherwise, purchase food or fuel with municipal funds" and may store or sell the same. Quoted from *The New York Times*, August 30, 1917.

ferring to the public purpose rule, the supreme court answered:[20]

It is not easy to determine in every case whether a benefit conferred upon many individuals in a community can be called a public service within the meaning of the rule that taxes can be laid only for public purposes. In general, however, it may be said that the promotion by taxation of the private interests of many individuals is not a public service within the meaning of the Constitution.

The court went on to argue that there was nothing in the history of the adoption of the constitution that gives any countenance to the theory that the buying and selling of such articles as coal and wood for the use of the inhabitants was regarded at the time as one of the ordinary functions of the government which was to be established. Although cities might be authorized to own and operate utilities such as gas and electricity,[21] the public character of these rests upon other grounds. Said the court in conclusion:

But when the Constitution was adopted the buying and selling of wood and coal for fuel was a well-known form of private business, which was generally carried on as other kinds of business were carried on; and is now carried on in much the same manner as it was then. It was and is a kind of business which in its relations to the community did not and does not differ essentially from the business of buying and selling any other of the necessaries of life. Although all kinds of business may be regulated by the Legislature, yet to buy and sell coal and wood for fuel requires no authority from the Legislature, and requires the exercise of no powers derived from the Legislature, and every person who chooses can engage in it in the same manner as in the buying and selling of other merchandise. We are not aware of any necessity why cities and towns should undertake this form of business any more than many others which have always

[20] Opinions of the Justices, 155 Mass. 598 (1892).
[21] Citing Opinion of the Justices, 150 Mass. 592 (1890).

been conducted by private enterprise, and we are not called upon to consider what extraordinary powers the Commonwealth may exercise, or may authorize cities and towns to exercise, in extraordinary exigencies for the safety of the state or the welfare of the inhabitants. If there be any advantage to the inhabitants in buying and selling coal and wood for fuel at the risk of the community on a large scale, and on what has been called the cooperative plan, we are of the opinion that the Constitution does not contemplate this as one of the ends for which the government was established, or as a public service for which cities and towns may be authorized to tax their inhabitants.

In 1903 this opinion was reaffirmed;[22] but in answer to the question whether the city could be empowered to buy and sell fuel in an extraordinary emergency, the court expressed the guarded opinion that in certain emergencies legislation looking to this end might be sustained.

Quite otherwise was the decision of the supreme court of Maine in respect to the validity of a law of 1903 which empowered any city or town to establish "a permanent wood, coal, and fuel yard" and to sell fuel at cost. After an extended discussion of the evolution of public needs and municipal functions, the court argued as follows:[23]

The petitioners contend . . . that in the case of the distribution of water, and of light and heat by gas or electricity, the use of the public highways is required for the mains and the poles and the wires, that the purpose is public because it is necessary to obtain permission from public authorities, either state or municipal, in order to carry it out. We grant that in those cases this element of public per-

[22] Opinion of the Justices, 182 Mass. 605 (1903). The New York law, mentioned *supra*, p. 194, n. 19, authorized the purchase and sale of fuel in emergencies.

[23] Laughlin *v.* City of Portland, 111 Me. 486 (1914).

mission exists, but it does not follow that the converse is true and that no purpose is public where such permission does not exist. How can this criterion be applied to the erection of public buildings, the erection of a park, the building of a memorial hall, or of a market house, or the maintenance of a public clock? In other words, under this rule, public service of this sort would be limited to one which can only be performed by a so-called public service corporation and not by an individual or corporation, independent of chartered rights. This is in our judgment too narrow. It makes an incident to some forms of public service an essential element. It transforms the method or means of rendering the service into the essence of the service itself. . .

Let us look at the question from a practical and concrete standpoint. Can it make any real and vital difference and convert a public into a private use if instead of burning the fuel at the power station to produce electricity, or at the central heating plant to produce the heat, and then conducting it in the one case by wires and in the other by pipes to the user's home, the coal itself is hauled over the same highway to the same point of distribution? We fail to see it. It is only a different and simpler mode of distribution.

In pursuing this line of reasoning the Maine court probably did not mean to imply that there was no distinction between public and private business or that a city might be empowered to undertake any and every kind of business enterprise. Years before, it had been held in the same jurisdiction that towns might not be authorized to go generally into the manufacturing business; [24] and in the case now at bar the court recognized the necessity of finding some basis upon which the public character of the fuel business might be established. The opinion continued:

In the case of fuel the practical difficulty is caused by the existence of monopolistic combinations. . . The difficulty and practical

[24] Opinion of Justices, 58 Me. 590 (1871); *infra*, 240.

impossibility of obtaining an adequate supply for private needs at times in the past, and the consequent suffering among the people, especially in the more populous cities, are matters of history, and this difficulty may as well be caused by unreasonable prices as by shortage of quantity. All this is a matter of common knowledge and cannot be overlooked by the court. The supply of water may be inadequate from one cause, that of fuel from another, but out of each arises the condition which renders the furnishing of it by the municipality a public use.

In other words, here an actual monopoly was alleged to exist—certainly it was neither a legal nor a natural monopoly. Here were resulting conditions—shortage and high prices. Such conditions transformed the fuel business from a private to a public business and justified the entry of the city. It was apparently unnecessary even to discuss whether these conditions, caused by "monopolistic combinations," could be remedied by other legal means, state or federal.[25]

One may sympathise with and even heartily applaud the judgment reached by the court in this case, more especially in view of the apparent failure of our "anti-trust" legislation to produce any appreciable effect upon many prices. At the same time one must recognize that a legal rule founded upon the economic theory here advanced would go a long way toward destroying the "public purpose" rule. Perhaps it ought to be destroyed. But would it not be better logic, more in accord with legal history, and perhaps in the long run more satisfactory, to declare fearlessly that all

[25] See recommendations contained in the *Report on Anthracite Coal* by the Massachusetts Commission on the Cost of Living, December 27, 1916. Among other recommendations the establishment of municipal coal pockets was proposed. These would, of course, be comparable to ordinary municipal markets.

business is public business, and that a city duly authorized may, so far as constitutional principles are concerned, embark upon any business enterprise? Viewed in the light of the slow movement toward municipal ownership of the usual public utilities in the United States, even where legal capacity has not been wanting, it is highly improbable that such a liberal rule would result in a wide and reckless extension of municipal trade.

As the fuel business in New England, so the ice business in the South has been the subject of judicial consideration as a municipal enterprise; and the opposing views are presented by the Georgia and the Louisiana courts respectively. Says the Georgia court: [26]

If a city has the right to furnish heat to its inhabitants, because conducive to their health, comfort, and convenience, we see no reason why they should not be permitted to furnish ice. The object in bringing, by means of a waterworks system, water in pipes from a distance, for use in supplying the needs of a city, is not alone to obtain a sufficient quantity, but also to secure that which is freer from impurities than it is possible to obtain in the city itself. If, in the hot season of the year, the inhabitants of the city must, for sanitary reasons, relinquish the cool draft from the well, because, as has been demonstrated, wells of pure water cannot be maintained in populous communities, surely the city would have the right, were it practicable, to cool the water which it delivers through pipes as a substitute, and which ofttimes is scarcely drinkable in its heated condition. If not practicable to cool it in the pipes, and if it be necessary to the welfare, comfort, and convenience of the inhabitants that its temperature be lowered before being used for drinking purposes, why can not the city provide for the delivery of such part of it in a frozen condition, to be used in cooling such part of the balance as is to be used for drinking purposes? Is the difference between water in

[26] Holton *v.* Camilla, 134 Ga. 560 (1910). There was no question here of charter power, for the power had been expressly granted by the legislature.

liquid and in frozen condition a radical one? Upon what principle could the doctrine rest that liquid water may be delivered by the city to its inhabitants by flowage through pipes, but that water in frozen blocks cannot be delivered by wagons or otherwise? . . If . . . the furnishing of ice to its inhabitants is conducive generally to their health, comfort, and convenience, it is certainly being furnished for a municipal or public purpose. . . Why, then, in the exercise of its police power, may not a city guard against impurities in the ice, as well as the water, used by its inhabitants? Nor do we see any rational objection to the idea that the city will be engaging in a manufacturing enterprise. The city might, perhaps, equally as well be said to be manufacturing when by the use of a filtering process it changes impure water into that which is pure. When, in connection with its waterworks system, it produces ice, it merely, by certain processes, changes the form and temperature of a part of the water supplied by that system. We do not think the operation by the city of Camilla of an ice plant in connection with its waterworks system, or for the purpose of furnishing ice to its inhabitants, is in violation of the sections of the constitution referred to in the plaintiff's petition, or that it is illegal for any reason.

To this line of argument the Louisiana court replies: [27]

All analogy between the municipal distribution of water and the municipal distribution of ice is destroyed by the fact that for the one business pipes have to be laid in the public streets, and, necessarily, for doing this, the streets have to be torn up and disturbed, whereas the other is a purely competitive business enterprise. There would be analogy between the two if the city were to abandon the sovereign mode of water distribution by means of underground conduits through the public streets, and to go peddling the liquid, as is done in towns unprovided with waterworks and unblessed by a sufficient rainfall for gathering a supply in cisterns, and as has to be done with ice. There would then be complete analogy; but everybody would then see that the town was no longer discharging a sovereign function, but carrying on a private enterprise.

[27] Union Ice & Coal Co. *v.* Town of Ruston, (La.) 66 So. 262 (1914). An act of 1898 authorized any city or town to maintain an ice plant in connection with its waterworks or electric lighting system.

There is probably little to be said in rebuttal. Indeed, the argument of the Georgia court on the ice proposition seems scarcely as satisfactory as that of the Maine court on the fuel question; for the latter court did, in last analysis, rely upon alleged monopolistic conditions to sustain the public nature of the business. The physical analogy between water in liquid and water in frozen form is manifestly no greater than innumerable other analogies that might be drawn; and whether or not a monopoly of fact actually existed in this little city, the court did not rest its decision upon this ground. So far as the police power is concerned, surely it is a new view of the law that the city may go directly into any business that calls for regulation under the police power. However, it is well known that for one reason or another many cities have labored under trying conditions in respect to the supply and price of ice. For some time there has been agitation here and there for municipal plants, and one or two cities have actually gone into this business without any judicial controversy having been raised.[28] This does not, of course, affect the unsettled status of the law.

On the whole it may fairly be concluded that, apart from establishing markets and furnishing terminal facilities, the power of the American city to control living costs is at the present time largely a matter of doubt, with the odds probably against the city. However questionable as to historical origin and however

[28] See Wentworth, *A Report on Municipal and Government Ice Plants*, submitted to the President of the Borough of Manhattan, City of New York, December 15, 1913.

uncertain as to definition, the distinction between public and private business is firmly lodged in the law. We have no concern here with the policy of price-fixing or the merits and demerits of municipal trade. The probability is that there will be a slow expansion of each of these policies under judicial allowance. Those who have affection for legal consistency and precision would doubtless like to see the distinction either rigidly applied or wholly abandoned, in accordance with their respective philosophies of government. Certain it is that if difficulties arising out of the existence of a mere monopoly of fact or of a local combination of dealers are to be regarded as creating a condition which transforms a private business into a public business, the rule is already well on its way to the scrap heaps of the law. But it remains to be seen whether the courts will generally accept this view.

CHAPTER VIII

MUNICIPAL RECREATION

It is difficult to describe with accuracy the precise functions of government that fall within the concept of the term "public recreation." It is difficult also to determine, as a matter of policy irrespective of the law, the extent to which cities should go in supplying facilities for public recreation. It is certain, nevertheless, that the problem of recreation for the people, considered without any attempt at exact definition, bears a tangible relation to more than one of the prime purposes of government. Whatever may be the rôle of the "play instinct" in man's psychology, everybody must recognize that refreshment of body and mind after toil is indispensable to human health. And however the more or less natural tastes of individuals may differ in the matter of satisfying their need for this refreshment, everybody must recognize that certain forms of recreation are sought by large numbers of people. Again, while it seems unnecessary to elaborate the lines of immediate or indirect connection between recreation and education, it is none the less certain that many such lines exist; and of course the furnishing of facilities for education has long been recognized as an appropriate function of government. It is indisputably established, moreover—if indeed any scientific evidence on this point were necessary—that modes of recreation, which must of necessity vary largely with

opportunity, bear a very definite relation to the subjects of delinquency and crime. Surely no one would be hardy enough to argue that punishment for delinquency and criminality is in itself a social end. Society's object is the prevention of crime; it is therefore superfluous to argue that any and every means looking toward the attainment of that object is a legitimate function of government.

As a general proposition, then, it is easy to link up the subject of public recreation with some of the more obvious purposes of government. The only question is: what facilities for recreation should be provided by the government and what principles of our law, if any, have been considered in this connection?

Parks and playgrounds

Certainly the most important of the recreational services of American cities is the establishment and maintenance of parks. This term is used generically to cover many different kinds of public grounds. It covers, for example, city squares, commons, and public gardens, which are usually of small area and are located both in residential and business sections. It covers parkways and boulevards, which are more frequently than not streets rather than parks, although they often combine features of both. It covers, of course, the large parks, varying in size, let us say, from two hundred to a thousand or more acres, and including tracts within the built-up section of the city as well as upon its outskirts and sometimes even beyond its territorial limits. It covers playgrounds, which themselves vary in character and which usually are independent

units although sometimes they are embraced within parks devoted also to other uses. Finally the term park is used to cover certain specialized public grounds such as zoological parks or botanical gardens. In spite of the variations in character and purpose of these several kinds of parks, the essential object of all of them is to afford opportunity for public recreation.

In an opinion delivered by the United States Supreme Court in 1892 there occur some rather interesting introductory remarks on the subject of the legal aspects of parks.[1] The point as to the public purpose of a park was not at issue in the case, but the court said:

> In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power.
>
> It is true that, in the case of many of the older cities and towns, there were commons or public grounds, but the purpose of these was not to provide places for exercise and recreation, but places on which the owners of domestic animals might pasture them in common, and they were generally laid out as part of the original plan of the town or city.
>
> It is said, in Johnson's Cyclopædia, that the Central Park of New York was the first place deliberately provided for the inhabitants of any city or town in the United States for exclusive use as a pleasure-ground, for rest and exercise in the open air. However that may be, there is now scarcely a city of any considerable size in the entire country that does not have, or has not projected, such parks.
>
> The validity of the legislative acts erecting such parks, and providing for their cost, has been uniformly upheld.

It is doubtless true, as the court here indicated, that the establishment of extensive parks is a fairly modern

[1] Shoemaker *v.* United States, 147 U. S. 282 (1893).

municipal policy. It is perhaps a mistake, however, to give the impression that the use of the power of eminent domain in the acquisition of park lands was at any time widely contested as a "novel exercise of legislative power." In most of the cases which the Supreme Court went on to cite [2] in support of the rule that "land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health or business, is taken for a public use," no contention to the contrary was apparently made. An early New York case, decided in 1836,[3] may possibly be regarded as an exception. The contention was there urged that the purpose for which property was taken for a public square in the city of Albany was "not public, because the benefit is limited to, and the expense assessed upon a few individuals." In answer the court said:

> Private property is taken for public use, when it is appropriated to the common use of the public at large. A stronger instance cannot be given, than that of a lot of an individual in a city converted into a street; the former owner has no longer any interest in or control over the property, but it becomes the property of the public at large, and under the control of the public authorities. A public square depends on the same principles; it is for public use, whether it is intended to be travelled upon or not. The mode of compensation for such property is not important.

[2] Brooklyn Park Commissioners *v.* Armstrong, 45 N. Y. 234 (1871); *In re* Commissioners of the Central Park, 63 Barb. (N. Y.) 282 (1872); Owners of Ground *v.* Mayor of Albany, 15 Wend. (N. Y.) 374 (1836); Holt *v.* Common Council of Somerville, 127 Mass. 408 (1879); Foster *v.* Boston Park Commissioners, 131 Mass. 225 (1881); also 133 Mass. 321 (1882); St. Louis County Court *v.* Griswold, 58 Mo. 175 (1874); Kerr *v.* South Park Commissioners, 117 U. S. 379 (1886).

[3] Owners of Ground *v.* Mayor of Albany, 15 Wend. (N. Y.) 374 (1836).

In this case the court was invited to consider an action involving not only appropriation of property by eminent domain but also the policy of paying for the property by special assessments. Although this latter policy was not wholly novel in 1836, it was by no means common.[4] It is probable, therefore, that the allegation concerning the non-public character of the public square in question was prompted chiefly by the fact that it was paid for not by the public at large but by a few private persons.

In a much later New York case [5] it was said that "the courts of this state have repeatedly held that land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health or business, is taken for a public use; and there appears to be no reason for doubt on the subject." In support of the "repeated" determinations on this point the court gave no citations of cases. Moreover, even in this case apparently no contention was made that called for any expression of view upon this point. A similar dictum is found in a Massachusetts case decided in 1879.[6] In this latter state the courts

[4] Rosewater, *Special Assessments: A Study in Municipal Finance*, in Columbia University Studies, II.

[5] *In re* Commissioners of Central Park, 63 Barb. (N. Y.) 282 (1872).

See also Brooklyn Park Commissioners *v.* Armstrong, 45 N. Y. 234 (1871), where it was said that lands taken for a public park "are taken for a public use." This view was expressed, however, merely in connection with a discussion of the character of the title which a city acquired in lands taken for park purposes.

[6] Holt *v.* Common Council of Somerville, 127 Mass. 408 (1879). The dictum ran: "In the exercise of the right of eminent domain the power to take private property for a public purpose is not open to question. There are considerations affecting the public health and comfort of a dense population, which the Legislature in such cases may well regard as sufficient to create a public necessity . . . Such necessity affects a large portion of

have gone so far as to hold that a town may lay out a road across the private property of a person in order to give the public access to points of "pleasing natural scenery," even though such a road merely made a circuit from the regular highway, led to no other road or landing place, and gave access to lands of no other person.[7] This case, however, did not involve any question of park lands and is of interest in this connection only because the road in question was manifestly for purposes of recreation rather than for the usual highway purposes.

In Missouri the contention was made [8] that the acquisition of lands by a *county* for park purposes was "clearly not for a public use;" but the situation in this case was peculiar. The county of St. Louis was required to establish a park in the vicinity of the city of St. Louis, which was at that time a part of the county. The real objection to the act was that it required the *county* to pay for an improvement which was primarily for the benefit of the *city*. There are few, if any, principles of our law that enable the courts to furnish relief in occasional instances, such as this, of apparent injustice in the apportionment of local financial burdens. The doctrine that eminent domain can be employed only for a public purpose was obviously put forward in this case in the effort to seek some sort of principle that could be invoked; and so the argument was advanced "that a public park is a public use only for a munici-

the community, and cannot ordinarily be met except by the power to take private property, the cost of which, in part, at least, may be imposed upon those who are specially benefited, when that benefit is in part local."

[7] Higginson *v.* Inhabitants of Nahant, 93 Mass. 530 (1866).

[8] St. Louis County Court *v.* Griswold, 58 Mo. 175 (1874).

pality or a center of a dense population, but that it is not demanded for the people of a county." Under these somewhat unusual circumstances, and in spite of the fact that the court did discuss the public purposes of parks, this case should hardly be cited as supporting the view that the court was called upon to refute the contention that the establishment of municipal parks is not a public purpose. Incidentally it may be mentioned that Forrest Park, over which this controversy arose, was, shortly after this decision, included within the city of St. Louis and that there was a general adjustment of obligations between the city and the county upon the separation of the two corporate entities.

It is quite true that there have been numerous cases before the courts involving the construction of statutes providing for the establishment of parks; [9] but it seems reasonable to conclude that the proposition that the establishment of these primary facilities for public recreation has seldom, if ever, been seriously questioned on the ground that they were not for a public use. Even playgrounds, the most recent of our types of parks, which have within a few years developed with astonishing rapidity in American cities, and which involve certain new features, such as the furnishing of directors and the supply of more or less elaborate equipment, seem nowhere to have been contested before the courts. The construction and maintenance in the parks of golf links, tennis courts, skating rinks, gymnasiums, bath-

[9] See in addition to those cited by United States Supreme Court, *supra*, Susanna Root's Case, 77 Pa. St. 276 (1875); People *ex rel.* McCagg *v.* Mayor etc. of Chicago, 51 Ill. 17 (1869); People *ex rel.* Wilson *v.* Salomon, 51 Ill. 37 (1869); Cook *v.* South Park Commissioners, 61 Ill. 115 (1871); Matter of Commissoners of Washington Park of Albany, 52 N. Y. 131 (1873).

houses, and fields for baseball and other games are likewise in the category of uncontested activities. In a recent New Jersey case [10] the contention was made that a charter grant of authority "to provide for, construct, regulate, protect and improve parks" did not authorize the city of Long Branch to erect a "casino" in a park. In answer to this contention which in fact went only to the matter of charter construction and not to the larger question of public purpose, the court replied:

> We think these powers sufficient to include the power to improve newly-acquired parks as well as parks already owned by the city. It was rather suggested than argued that the statute did not authorize the improvement of the former class. The force of the argument was directed to the point that the erection of a casino was not an improvement of the park. We do not think it necessary to define the word "casino." Obviously, it is a building the use of which may vary from time to time. It is enough, for the present purpose, to say that the proceedings disclose that the building to be constructed is intended for public purposes, either for public amusement or convenience. Buildings used for such purposes are not uncommon in public parks, and serve a useful purpose not foreign to the purpose of public recreation for which parks are meant. Calling it a "casino" does not alter its character. We think that such a building may fairly be called an improvement. Buildings are commonly spoken of as improvements to the land. A similar opinion was expressed by this court in *Knight v. Cape May*, 32 *Vroom* 149, where Justice Collins suggested that the charter of Cape May authorized the erection of a pavilion.

If it be conceded that the furnishing of facilities for public recreation in parks is an appropriate function of government, or—to emphasize the legal point—is a public purpose, it is difficult to see how a line of legal inhibition could be drawn against any of the newer facilities with

[10] Ross *v.* Long Branch, 73 N. J. L. 292 (1906).

which parks have been and are being provided. The extent to which the government shall go in this direction is a matter of policy rather than of law.[11]

Public halls, auditoriums, opera houses, theaters

Outside of New England it is in comparatively recent years that American cities have entered into the field of erecting and maintaining public halls, auditoriums, or theaters; and even now this function as an enterprise of the city itself is exceptional. In New England the existence of the town meeting as a primary institution of government early gave rise to the necessity for a hall in which the voters might assemble. Not all the towns have found it necessary to own and maintain halls for this purpose; but many of them have done so. Obviously, however, a hall is needed only occasionally for town-meeting uses; it is not surprising, therefore, that, combining thrift with public spirit, these towns have sometimes constructed their halls with reference to uses other than the now-and-then assemblages of electors. Nor is it surprising that the legal aspects of the subject of town halls occupy a place in the judicial records of this section of the country.

In Massachusetts towns have since the year 1692 been empowered to make appropriations for certain specified purposes and for "other necessary charges." The mean-

[11] In Bloomsburg Improvement Co. *v.* Bloomsburg, 215 Pa. St. 452 (1906), it was held that a borough had no charter power to lease from a private owner a pleasure park, containing a dancing pavilion, refreshment booths, boating facilities, etc., and to operate it upon an admission fee basis. The issue was merely as to statutory power; but the court, evidently much opposed to the policy involved, said: "The people of Bloomsburg had no need of such a place for the purpose of good air, nor for recreation."

ing of this phrase "other necessary charges" has been frequently before the courts for consideration in connection with the erection of town halls.[12] It has been uniformly held that the expenditure of money for a town hall is a necessary charge and that the incidental use of such a hall for purposes other than the meetings of the voters and the housing of town offices did not vitiate the public character of the enterprise. So also where a town had accepted land dedicated for the erection of a town hall it was held that the use of the hall for other purposes, such as the meetings of political parties, agricultural societies, and conventions and the holding of public lectures did not violate the terms of the deed.[13]

In a Maine case the court declared that a town did not exceed its authority when it contracted to allow a dramatic company to use its town hall for a period of six years, when not needed for town purposes, in consideration of expenditures to be made by the company for improving the building.[14] And in Vermont the construction and maintenance of an opera hall in connection with a town hall was likewise sustained.[15] On the same principle school buildings[16] and city halls[17] might

[12] Stetson *v.* Kempton, 13 Mass. 272 (1816); Spaulding *v.* Lowell, 23 Pick. 71 (1839); French *v.* Quincy, 3 Allen 9 (1861); George *v.* School District, 6 Met. 497 (1843); Oliver *v.* Worcester, 102 Mass. 489 (1869); Worden *v.* New Bedford, 131 Mass. 23 (1881); Kingman *v.* Brockton, 153 Mass. 255 (1891); Commonwealth *v.* Wilder, 127 Mass. 1 (1879); Hadsell *v.* Hancock, 3 Gray, 526 (1855); Friend *v.* Gilbert, 108 Mass. 408 (1871); Tindley *v.* Salem, 137 Mass. 171 (1884); Little *v.* Holyoke, 177 Mass. 114 (1900).

[13] French *v.* Inhabitants of Quincy, 3 Allen (Mass.) 9 (1861).

[14] Jones *v.* Inhabitants of Sanford, 66 Me. 585 (1877).

[15] Bates *v.* Bassett, 60 Vt. 530 (1888).

[16] George *v.* School District in Mendon, 6 Met. (Mass.) 497 (1843); Greenbanks *v.* Boutwell, 43 Vt. 207 (1870).

[17] Parker *v.* Concord, 71 N. H. 468 (1902); Worden *v.* New Bedford, 131 Mass. 23 (1881).

be erected so as to be used for purposes incidental or collateral to their primary uses.

Even outside of New England the courts have apparently been disposed to allow public buildings to be constructed for, or being constructed, to be used for, purposes not related to their principal and obviously governmental use. Thus in Wisconsin a city was permitted to lease a newly erected city hall for theatrical performances, concerts, lectures, shows, dances, and general entertainments.[18] And in Missouri a town was allowed to accept a dedication of land for the erection of a public building under the stipulation that the building should contain a public hall.[19] In this latter case the court remarked:

> A hall in which the trustees might find it proper to conduct their sessions in public, in which elections may be held, and where the inhabitants of the town may assemble to consider and discuss matters of public importance, would not, I conceive, be foreign to the uses and benefits to which the property of the corporation may be reasonably devoted. Accommodations of this character, such as Independence Hall or Faneuil Hall, are so familiarly associated with the early history of this nation, as nurseries of its infant liberty, that I am reluctant to believe that, in the course of a century they have ceased to be in accord with the life and weal of American towns. Public halls and popular assemblies are out of place only in governments conducted by despots, where the people have no power and no voice. In a government where they have the right to assemble for the purpose of considering and discussing their public affairs, a convenient and commodious hall for them to assemble in, is, in my opinion, a proper and necessary want of the inhabitants of every town.

While it is certainly true that in many of these instances, when the character and actual uses of the

[18] Belle *v.* Platteville, 71 Wis. 139 (1888).

[19] Clarke *v.* Inhabitants of Brookfield, 81 Mo. 503 (1884).

buildings in question are considered, the strictly governmental purpose often seems to be in fact incidental rather than primary, the courts have apparently been reluctant to stand in the way of enterprises of this kind. In a Connecticut case, however, a town was prevented from erecting a town hall where the principal part of the building was to be given over to stores and offices which were to be rented.[20] So in a recent Iowa case,[21] involving a question of statutory power rather than of constitutional law, the court expressed itself as follows:

We are abidingly satisfied that the building, as planned, is not such a one as the town had authority to build. It is in fact an opera house with all the necessary equipment for such a building. The town offices and the place for the fire department were mere incidents to the building. However desirable it may be for rural towns to have a large assembly hall or opera house, it is not within the power of the town council to build it. The officials are not ordinarily selected to manage theaters or opera houses, and in view of the fact that when so managed the town becomes responsible for their care and safety, and is liable to any one injured by or through the neglect of any one of the officials or employees of the city, it is a burden which should not be assumed. There was no need for such a building for municipal purposes, and it is but a thin disguise to cover a purpose not authorized by law. The burdens of taxation are heavy enough without entering upon any such hazardous enterprises as are here proposed. Our form of city government is representative in character and is in no sense like the New England town meeting. Where that system of government obtains a large assembly hall is no doubt necessary; but there is no occasion for one where all our elections are by ballot. The room provided in this building was large enough for a county courthouse, and we find nothing in the statutes which will justify such a building. Moreover, we are

[20] White *v.* Stamford, 37 Conn. 578 (1871).
[21] Brooks *v.* Town of Brooklyn, 146 Ia. 136 (1910).

satisfied that the real intent was to avoid the statutes to which we have referred, and it is our duty to prevent any such evasions.

In recent years a number of cities have erected or have attempted to erect halls, auditoriums, or theaters, without any pretense that the buildings in question were to be used in part for strictly governmental purposes. In Massachusetts, for example, the court sustained a statute authorizing a city to erect a memorial hall. The opinion declared:[22]

This may properly be deemed to be a public purpose, and a statute authorizing the raising of money by taxation for the erection of such a memorial hall may be vindicated on the same grounds as statutes authorizing the raising of money for monuments, statues, gates or archways, celebrations, the publication of town histories, parks, roads leading to points of fine natural scenery, decorations upon public buildings, or other public ornaments or embellishments, designed merely to promote the general welfare, either by providing for fresh air or recreation, or by educating the public taste, or by inspiring sentiments of patriotism or for the memory of worthy individuals.

So in a Massachusetts case,[23] decided in 1907, it was held that the city of Lowell could construct a hall to take the place of Huntington Hall, which had been destroyed by fire. It was admitted in this case that if the project was colorable, "masking under the pretext of a public purpose a general design to enter into the private business of maintaining a public hall for gain, or devoting it mainly to any other than its public use as a gathering place for citizens generally, such an

[22] Kingman *v.* Brockton, 153 Mass. 255 (1891). It was held in this case, however, that the city could not set apart a portion of this building to be used by a G. A. R. post without payment of compensation. This would not be a public purpose.

[23] Wheelock *v.* City of Lowell, 196 Mass. 220 (1907).

attempt would be a perversion of power and a nullity and no public funds could be appropriated for it." It was evidently the view of the court, however, that the use of a hall for "political rallies, conventions and other public meetings of citizens" was "a strictly public use." Emphasis was laid upon the fact that the constitution guaranteed the right of assembly; and the implication was that such a hall merely furnished a place of assembly. The competence of the city to furnish a place for public recreation was not mentioned. That the building might be let for private uses, such as entertainments and amusements, did not affect its general legal purpose. Looking backward the court said:

> It is hard to overestimate the historic significance and patriotic influence of the public meetings held in all the towns of Massachusetts before and during the Revolution. No small part of the capacity for honest and efficient local government manifested by the people of this Commonwealth has been due to the training of citizens in the forum of the town meeting. The jealous care to reserve the means for exercising the right of assembling for discussion of public topics manifested in city charters by the representatives of the people, whenever providing for the transition from the town meeting to the city form of local government, demonstrates that a vital appreciation of the importance of the opportunity to exercise the right still survives. The practical instruction of the citizen in affairs of government through the instrumentality of public meetings and face to face discussions may be regarded quite as important as their amusement, edification or assumed temporal advancement in ways heretofore expressly authorized by statute and held constitutional.

In 1905 the question was presented to the supreme court of Colorado whether the city of Denver could erect an auditorium which was apparently to be used

chiefly as a theater.[24] In sustaining this competence in the city the court argued that the existing public buildings in Denver were wholly inadequate and that the proposed auditorium ought to provide accommodations for a portion of the public offices and public records, although it was not disclosed that such was in fact the intention of the city. It was argued further that since Denver had the power to frame and adopt its own charter a place for public discussions ought to be provided. Moreover it was proper that the city should "own a place where the public can witness the exercises of commencement day of the various high schools of the city," there being no hall at that time sufficiently large to accommodate all the persons desiring to attend such exercises. For these reasons the court concluded that the erection of a municipal auditorium was a proper municipal purpose. Here again, it will be noted, the court was at great pains to locate a few obviously public purposes for which such an auditorium might be used. There was no express declaration that the city could own and manage such a building for general recreational purposes. The decision, nevertheless, did enable the city to embark upon an enterprise which has in fact been of this general character.

In 1908 contest arose in Oklahoma over the attempt of the city of Guthrie to issue bonds for the construction of a convention hall.[25] The court held that such a hall was a "public utility" within the meaning of that term as it was employed in the state constitution. In dem-

[24] Denver *v.* Hallett, 34 Col. 393 (1905).

[25] State *ex rel.* Manhattan Construction Co. *v.* Barnes, 22 Okla. 191 (1908); *supra*, 153.

onstration of the "public use" of a building of this kind the opinion recited:

> In a government where the right of public assembly for the redress of grievances is guaranteed to the people, where the policies of government are in a great measure determined at public gatherings of the people in political conventions, where the lecture platform has become so important a factor in public education, and where people frequently assemble for the purpose of discussing and devising ways and means of promoting their varied interest, a place in large cities where such gatherings may be had under comfortable hygienic conditions is not only a public convenience and benefit, but a public necessity. We know of no case in which the question of whether a convention hall is a public use has been determined, but courthouses, jails, schoolhouses, city halls, public markets, almshouses, public parks, boulevards, commons or pleasure grounds, and places of historic interest are examples of uses that have been declared by the courts to be "public uses."

In 1913 the California supreme court decided that the city of San Francisco, under the authority granted by its charter to acquire land for a civic center and to authorize the erection by a private company of "an opera house, museum, or other structure," could not enter into a contract with a musical association by the terms of which the association was to construct a magnificent opera house upon ground furnished by the city. The city was to retain the naked legal title to the property but the "beneficial attributes of ownership" were apparently to pass to the association. The court seemed to have the idea that actual ownership and control by the city itself was necessary in order to show the public purpose of a municipal expenditure, although this general idea has been frequently repudiated.[26]

[26] See, for example, Olcott *v.* Supervisors, 16 Wall. 678 (1872), where this point is directly discussed and dismissed.

However, it was clearly intimated that if it had been necessary to decide the point the court would have held that the direct ownership and management of an opera house was a function appropriate to be undertaken by a city. In this instance the proposed enterprise was interfered with simply because of the alliance which was attempted to be made between the city and a private association.

Quite otherwise was a decision of the highest court in Louisiana in 1842, sustaining the competence of New Orleans, to subscribe to the stock of a theater company which, strange as the combination may seem, was engaged chiefly in the business of fire and marine insurance.[27] This was in fact prior to the time when the public purpose rule had been announced in its application to the power of taxation. The court apparently never thought of such a constitutional limitation. "In relation to the acquisition and disposition of property," it was said without a qualm, "this law confers powers as plenary, or nearly so, as are possessed by an individual." To the mind of the court there seemed to be nothing extraordinary about that. It was incidentally averred, however—and this is the point of interest in this connection—that "the object of the Council in making this subscription, is stated to have been to aid in the construction of a large theater in the Municipality, which would contribute to its wealth and embellishment, and afford a place of relaxation and amusement, that would tend to correct the morals and enlighten the minds of the citizens." There was not

[27] First Municipality of New Orleans *v.* New Orleans Theater Co., 2 Rob. (La.) 209 (1842).

the slightest intimation that such an object was not both laudable and legitimate.

In 1913 the city of Toledo attempted by ordinance to provide for the establishment of a motion picture theater to be owned and operated by the city.[28] The opinion rendered in this case was greatly complicated by reason of the recently adopted home rule provisions of the Ohio constitution. It cannot indeed be said that the question whether a city could be empowered to own and operate a theater of this kind was, as such, directly passed upon by the court. The ordinance in question did not in any wise indicate that the proposed theater was to be used either as a part of the city's educational work or of its recreational facilities. So far as was disclosed upon the face of the ordinance the city may have been undertaking this enterprise solely for profit. There was no question that the court was influenced by this fact. One of the judges indeed reached his conclusion as to the invalidity of this ordinance solely upon this ground. The best that can be said is that when the several opinions that were handed down in this case are carefully analyzed it seems probable that the majority of the court would not have prohibited a city from erecting and managing a motion picture theater if it had been clearly shown that the enterprise in question was established as a part of the city's educational or recreational services.

From this review of cases it seems reasonable to conclude that in spite of the endeavor of the courts to sustain the municipal establishment of public halls, auditoriums, or theaters, by reference to certain primary

[2] State *ex rel.* City of Toledo *v.* Lynch, 88 Oh. St. 71 (1913).

uses, or to some of the more obvious public or governmental purposes for which such buildings might be established, they have on the whole been more liberal than otherwise in their attitude toward such enterprises. There is no doubt that as time goes on more and more cities will enter into undertakings of this kind. There seems to be no reason why the courts should not frankly avow that a city may erect buildings of this character under their general power to furnish public recreational facilities. That a city should hire or lease a building of this kind to private persons for theatrical or other performances or entertainments for which admission fees are charged would seem to have nothing to do with the legal problem involved. The city would go into the enterprise because of its public character—its relation to the subject of public recreation—and the publicness of the enterprise would be no more affected by this method of financing it than is the public character of a waterworks destroyed by reason of the fact that its operation is financed by the collection of fees from consumers.

Entertainments, celebrations, concerts

While a few American cities have, as has been indicated, erected buildings which are leased for performances and entertainments, no American city has as yet attempted to foster the dramatic and musical arts by furnishing theatrical and operatic performances at low cost, after the manner of many European cities. Our ventures in the field of furnishing such facilities for public recreation have been comparatively insignificant. Yet some law upon the subject has developed.

Entertainments for the public must, of course, be distinguished from more or less private entertainments which are occasionally given at public expense. It is a fairly established rule of law that, in the absence at least of express grant of authority, cities may not appropriate money for the entertainment of distinguished visitors. Thus in an early New York case [29] it was held that the city of Buffalo had no power to provide for an entertainment and ball given on Independence Day for citizens and "certain military guests." It does not appear whether the public generally was admitted to this entertainment and ball; but the probability is that they were not so admitted. So in a later New York case [30] it was held that a village had no power to entertain a company of visiting newspaper editors. To the contention that the expenditure had "been repaid by the effect on the village of subsequent editorial puffs," the court replied that it was "not proper for village trustees to hire editors to praise the attractions of the place;" and it was ironically added that "if it had been shown that the editors were paupers, then, under the duty of the village to care for the poor, there might have been some propriety in keeping them from starving." To the same effect was a Rhode Island case [31] which prohibited the city of Newport from paying for a ball and banquet given in honor of certain visiting officers of the British navy. Said the court: "The city neither danced at the ball nor feasted at the banquet. It got nothing substantial out of them. If the city's money goes to pay for

[29] Hodges *v.* City of Buffalo, 2 Denio (N. Y.) 110 (1846).
[30] Gamble *v.* Village of Watkins, 7 Hun. (N. Y.) 448 (1876).
[31] Austin *v.* Coggeshall, 12 R. I. 329 (1879).

them, it will go to pay for what the city neither bargained for nor enjoyed."

On the other hand, a Pennsylvania case must, perhaps, be regarded as sustaining the contrary view.[32] Under a general grant of power to enact such ordinances "as shall be necessary for the welfare and comfort of said city," the competence of the city of Philadelphia to appropriate $50,000 "to enable the mayor to extend the hospitalities of the city" to visitors at the centennial exposition was sustained. The court pointed to the fact that appropriations similar to this had frequently been made by the city without being challenged. And while it was admitted that "it does not profit the great body of the citizens that a few persons should eat and drink at their cost," yet it could not be denied, the court thought, "that public entertainments, temperately supplied, and on occasions of great public interest, may produce a moral effect in which all may share, and conduce to the diffusion of a fraternal feeling in the country at large and throughout the world."

In none of these cases, it should be remarked, have the courts held that power to provide entertainments for distinguished visitors *could* not be granted to a city. Although the question of public purpose has been discussed, the point at issue was simply whether any such power had in fact been granted by the legislature. It may be said in passing that while power of this kind has seldom been granted in express terms, and while the general rule is that it may not be exercised in the absence of express grant, such expenditures have in fact been made

[32] Tatham *v.* City of Philadelphia, 11 Phila., 276 (1876).

by cities in numerous instances that have not been contested before the courts.

Practically the same rule has been applied to the case of entertainments furnished for the public itself. Express power must be shown. Thus in an early Massachusetts case [33] it was held that a town was not authorized to appropriate money for an anniversary celebration of the surrender of Cornwallis at Yorktown. And in the same state, as well as in Connecticut[34] and New York,[35] appropriations for celebrations on the Fourth of July have similarly been interdicted where no statutory authority could be shown. Indeed, in the earlier cases upon this subject the arguments of the court against such expenditures were so broadly expressed that they seemed not only to hold that power *had* not been granted but also to intimate that such power *could* not be granted. For example, the Massachusetts court, discussing in 1861 an attempted appropriation for a fireworks display on Independence Day, expressed itself as follows:[36]

> Viewed in the most favorable light for the respondents, this vote authorized an expenditure of public money to celebrate the anniversary of a great event of national and historic interest, in a manner which might serve to amuse the inhabitants, and perhaps excite in their minds a spirit of patriotism and love of liberty. But these objects, however laudable, do not come within the range of municipal powers and duties. If money in the treasury of a city can be expended to commemorate an event of interest and importance in the history of the country, so it may be to celebrate the anniversary of any and every other. . .

[33] Tash *v.* Adams, 64 Mass. 252 (1852).
[34] New London *v.* Brainerd, 22 Conn. 552 (1853).
[35] Hodges *v.* City of Buffalo, 2 Denio (N. Y.) 110 (1846), *supra.*
[36] Hood *v.* Mayor etc. of Lynn, 83 Mass. 103 (1861).

Nor would there be any limit to the amount of money which might be expended for such purpose, nor to the mode in which the expenditure might be made, except that which might be prescribed by the will or caprice of the majority. If fireworks and illuminations can be permitted, so may dinners, balls and fetes of every description. It is obvious that such a power would open the door for great abuses, and expenditures of the most wasteful character.

However, at a later date, the same court did not intimate that an act which specifically authorized towns to appropriate money for the celebration of their centennial anniversaries was otherwise than entirely constitutional.[37] Moreover, under an act which had been passed immediately after the decision of the fireworks case just mentioned and which authorized cities to appropriate limited amounts "for the celebration of holidays and for other public purposes," the court went so far as to hold in 1886 that cities could make appropriations for band concerts. "Taking into account," said the court, "the history and language of the act, the safeguards attached to the exercise of the power, the smallness of the sum allowed to be expended, and the fact that it has long been assumed to be within the power of cities to give such concerts in the open air, we are not prepared to say that a case is presented for an injunction."

Municipal v. commercialized recreation

In most American cities of size there is some agitation for an extension of public recreational services in one form or another. The use of school buildings for social centers has become widespread within a few

[37] Hill *v.* Selectmen of Easthampton, 140 Mass. 381 (1886).

years and is rapidly expanding. The opening of these buildings for such purposes has given rise to certain more or less difficult administrative problems; but up to the present time few if any important questions of law have been involved.[38]

The prime general problem of the American city in the matter of recreation is the problem of the low-grade commercial amusement. For the most part this problem has been dealt with by the policy of regulation, looking to the elimination of some of the more flagrant evils and dangers that attend upon some of these amusement enterprises. Perhaps nowhere has this policy been wholly satisfactory, although it certainly is not without much to its credit. The only apparent alternative to regulation is for the city itself to furnish counter attractions. No city in this country has as yet adopted this policy to any considerable extent. The only form of entertainment regularly furnished by most cities is the band concert during the summer season—an activity which in the vast majority of instances has gone unchallenged before the courts. A few cities[39] have with varying success inaugurated municipal dance halls upon a limited scale; and here again, so far as appears, the courts have not been requested to interfere. Band concerts and municipal dances are, however, but scratches upon the surface of a big social problem. If the past general attitude of the courts toward the specific recreational facilities we have con-

[38] In State *ex rel.* Gilbert *v.* Dilley, (Neb.) 145 N. W. 999 (1914), the use of a school buiildng for religious meetings was the question before the court.

[39] Boston, Cincinnati, Cleveland, Denver, Milwaukee, San Francisco. See *Municipal Dance Halls*, Municipal Reference Bulletin No. 2, Chicago Public Library, March, 1914.

sidered may be taken as presage of their future attitude, it seems safe to conclude that, in seeking a solution of this problem by furnishing direct recreational services, the city will not be greatly impeded by the barrier of any fundamental principle of the law.

CHAPTER IX

PROMOTION OF COMMERCE AND INDUSTRY

With few exceptions it is commerce and industry that call cities into being; but cities are not organized for the purpose of promoting commerce and industry. They are organized to deal with many community problems that grow out of the congestion of population which commerce and industry create. Their prime purposes have little to do with the economic forces that govern commercial and industrial activities. It is nevertheless manifest that cities must of necessity touch commerce and industry either directly or indirectly at numerous points, and that it is within their power at times to foster or hinder. Indeed there is scarcely a function of the city which may not conceivably have some reflective effect upon the business conditions of the community. We are considering here, however, only such activities as may be conceived with the sole, or at least primary, purpose of promoting the business prosperity of the city. And even from these we may eliminate at this point those activities, such as the furnishing or regulation of port and terminal facilities, which have so important a bearing upon the contact of the city with the outside routes and connections of commerce. These activities present highly interesting questions of policy and plan, but they involve no general principles of law.

In what ways have American cities attempted to

foster and develop their commercial and industrial prosperity; and what principles of law, if any, have been involved in those attempts?

Development of water power

Apart from supplying or contracting for the usual public utilities, which have a more or less direct effect on the commercial and industrial development of a city, and apart from the matter of port and terminal facilities just mentioned, American cities have seldom attempted to embark in the direct ownership and operation of enterprises specifically designed to promote commerce and industry. Upon this subject, however, there is at least one interesting case of record. In 1875 the legislature of Wisconsin authorized the city of Eau Claire to construct a dam in the Chippewa river within the limits of the city and to lease and rent the water power thus created for manufacturing purposes. The supreme court of the state held this act void.[1] It was conceded that the city could be authorized to improve the navigation of the river, but this was not the purport of the act. It was conceded also that the city could be empowered to own and operate a waterworks and to lease any surplus water obtained in this connection; but the court held that this power to construct a waterworks, which was also conferred by the act, was wholly separable from the power to construct the dam. With little or no discussion of the specific point, although a lengthy opinion was written, the court did "not hesitate in holding, what was not questioned at the bar, that, if the

[1] Attorney General *v.* City of Eau Claire, 37 Wis. 400 (1875).

statute under consideration grants power to the city to construct and maintain the dam, for the purpose of leasing the water power for manufacturing purposes, it is a power for a private and not a public use, and cannot be upheld."

Immediately after the decision of this case, the legislature amended the law in question so as to make the power to construct the dam dependent on the power to construct the waterworks and so as to limit the power to lease water power to the excess not required for the waterworks. An effort was made to have the court declare this amendment colorable, but this was without success.[2]

In a Texas case decided in 1893[3] the court was asked to prevent the city of Austin from erecting a dam in the Colorado river on the ground that the enterprise was not for the pretended purpose of supplying the city with water and electric light but was in fact a "visionary and chimerical" venture undertaken "to obtain water power to sell or lease for speculative or commercial purposes." Private capitalists, so the allegation ran, had "refused to embark their means in so reckless a venture," and the scheme was thereafter foisted upon the city itself by certain persons who "conceived the idea of making the said city of Austin a great and populous commercial and manufacturing center" as a result of this public work. The court admitted that if the charge were borne out "that the supply of water and lights was a mere guise and pretense for constructing the dam, and that its main purpose was to promote

[2] State *v.* City of Eau Claire, 40 Wis. 533 (1876).
[3] City of Austin *v.* Nalle, 85 Tex. 520 (1893).

manufacturing enterprises," then "a very different case" would be presented. But the court was of the opinion that this charge had not been proved, but that, on the contrary, the plans which were projected showed "that the principal object was to supply the city with water and lights," and that "the use of any excess of power which might be developed was merely a probable and contingent result." [4]

In 1885 the question was presented to the supreme court of Illinois whether the city of Ottawa was competent to issue bonds for the purpose of aiding in the development of water power for the benefit of private manufacturers.[5] Relying especially upon the clause of the state constitution which empowered the legislature to authorize municipal taxes only for "corporate purposes,"[6] the court answered:

> It may be, and probably is true, that the contemplated improvement of the water-power on the Illinois and Fox Rivers in the city of Ottawa, if it had been judiciously and properly carried out, might have built up the city, and added greatly to its general growth, welfare and prosperity; but the establishment of any kind of manufactures which employed capital and labor within the city might have produced the same result, and yet the city would have no power to impose taxes to raise money to be devoted to such purposes. Whenever the tax is levied to aid in any private enterprise, it is prohibited by the constitution, although the object may be one which may add to the wealth and prosperity of the city. A municipal corporation cannot incur a liability and levy and collect taxes on the property of the citizens to aid in the development of mere private enterprises; but the corporation may become indebted, for corporate

[4] The court did not discuss in any detail whether the development of water power was or was not a public purpose.

[5] Mather *v.* City of Ottawa, 114 Ill. 659 (1885). See also on the subject of these bonds Ottawa *v.* Carey, 108 U. S. 110 (1882).

[6] *Supra*, 156.

purposes, where the purpose is one pertaining entirely to the interest of the public. Then the corporation may properly act, and the acts will be binding.

These few cases on the subject of municipal enterprise for the promotion of industry by developing water power are of interest only as they indicate the hesitancy of the courts to permit any extension of city functions beyond the beaten and customary path of the usual utilities. A number of cities now sell electric motive power to private industries; but this service has crept in, as it were, upon the trail of the recognized utility of lighting. It would seem that arguments of much greater force could be made for the furnishing by a city of power derived from water, which would be merely the improvement of a natural resource. It is significant, moreover, that in recent years the movement has gained tremendous headway for a preservation of water power sites still in the hands of the government and even for a reclamation of sites that have passed into private hands, although the attempts at reclamation have naturally encountered serious obstacles.[7]

Advertising the city

The national government, in addition to the "regulations" that it has imposed upon foreign and interstate commerce, maintains a number of important services in aid of commerce and industry. Most of the states likewise maintain departments or bureaus which, primarily for the purpose of attracting settlers, collect,

[7] See for example, The Water Power Cases, 148 Wis. 124 (1912). See also Laws of New York, 1915, ch. 349, by which a very broad grant of power is made to the city of Oswego to develop water power.

collate, and disseminate information concerning the natural resources and the industrial and commercial opportunities of the state. While it is not uncommon to find that cities are empowered, especially under general welfare clauses, to enact ordinances in the interest of "trade, commerce and manufactures,"[8] it is simply a fact that few cities have in any organized and purposeful way undertaken to advance these interests generally by informational and propagandic methods. Such activities have been left almost wholly to private initiative through the medium of chambers of commerce, boards of trade, or other similar associations—organizations which are now found even in communities of almost negligible size and importance.[9]

The city of Baltimore may be cited as an exception in this regard. This city maintains a regular department of government known as the "municipal factory site commission." The functions of this commission, as described in an official publication of the city,[10] are as follows:

> It is a public agency created for the purpose of promoting any movement that has for its end the development or enlargement of Baltimore's industrial activities.
>
> It is a department of the city government; supported by the city government. There are no charges, costs nor fees connected with its work.
>
> Any service performed by the department or any information given by the department is absolutely free of any financial burden to the person who seeks its aid or takes advantage of its co-operation.

[8] *Supra*, 32.

[9] In recent years a few cities have indeed capitalized certain strictly government reforms for what has at least appeared to be general advertising purposes; but publicity work of this kind, masquerading in missionary guise, is manifestly in a somewhat different category.

[10] *The Baltimore Book*, 1914, p. 27.

If you want to know anything about the business possibilities of Baltimore; if you want to get in touch with the city's financial interests; if you want to know what factory sites are in the market; in fact, if you want to know anything at all about any phase of the industrial affairs of the city or any of the problems incident thereto—communicate with the municipal factory site commission, City Hall.

You will find it ready to give help in any particular or in any direction whatsoever.

The commission is organized on a basis that puts it in touch with all the different business interests in Baltimore. . .

The commission has a finely developed system under which a wide range of factory sites is listed. Real estate dealers, as well as prospective manufacturers, are constantly referring to the commission's list whenever they have inquiries for industrial property.

The city itself controls about one hundred and seventy acres of waterfront territory with direct railroad connections.

The commission is in touch with a combination of magnificent buildings which have been converted into "beehive industrial colonies." All of the most modern appliances, power and other manufacturing advantages are readily available on attractive terms. These buildings are situated near the junction of two railroads.

The factory site commission will put anyone in touch with any of the above propositions.

The legal status of this commission in Baltimore has apparently not been questioned before the courts. Indeed it may be said generally that the establishment and maintenance of such a department is so wholly unusual among American cities that there is no law upon the subject. In view of the fact, however, that both national and state governments operate similar services, it is highly unlikely that the courts, if called upon, would hold that the expenditure of municipal funds for an activity of this kind was an expenditure for other than a legitimate and useful public purpose.

Municipal exhibits at expositions

For many years it has been a common practice for states to make appropriations for buildings and exhibits at expositions, and frequently also municipalities have been granted the power to make similar appropriations. However extravagantly and inappropriately many of these appropriations have been actually spent, they must doubtless be regarded as having been made primarily for the purpose of advertising the resources and business opportunities of the state or community. The expenditure of public money for such purposes has not often been contested; but in a few instances attempts have been made to invoke the resistance of the courts. Mention has already been made of the unsuccessful effort to prevent the city of Philadelphia from placing $50,000 at the disposal of the mayor for use in entertaining visitors at the centennial exposition in 1876;[11] but this case involved a question of entertainment rather than of exhibit. In both Kentucky and California the courts were asked to declare void appropriations which were made by the state legislatures for exhibits at the Columbian exposition held in Chicago in 1893. Without hesitation the supreme courts in these states declared that these were appropriations for a public purpose.[12]

In a Tennessee case, decided in 1896, an injunction was asked for to restrain a county from expending $25,000 that had been appropriated for an exhibit of the county's resources at the Tennessee centennial ex-

[11] *Supra*, 223.

[12] Norman *v.* Kentucky Board, 93 Ky. 537 (1892); Daggett *v.* Colgan, 92 Cal. 53 (1891).

position held in that year at Nashville.[13] The state constitution authorized the legislature to delegate the taxing power to municipalities only for "corporate purposes;" and it was alleged that this was not such a purpose. The court answered:

To our minds it is entirely clear that an exhibition of the resources of Shelby County at the approaching State Centennial Exposition is a county purpose. In view of the fact that the event to be celebrated is one of no less note and importance than the birth of a great state into the American Union, and of the further fact that the exposition is reasonably expected to attract great and favorable attention throughout the country, and be participated in and largely attended by intelligent and enterprising citizens of numerous other states, at least it is beyond plausible debate that such an exhibition is well calculated to advance the material interests and promote the general welfare of the people of the county making it. It will excite industry, thrift, development, and worthy emulation in different avenues of commerce, agriculture, manufacture, art, and education within the county, thereby tending to the permanent betterment and prosperity of her whole people. In short, it will encourage progress, and progress will insure increased intelligence, wealth, and happiness for her people, individually and collectively. Undeniably, that which promotes such an object and facilitates such a result in any county, is, to that county, a county purpose in the truest sense.

It is a vain impeachment of the purpose to say that the exhibition provided for is to be made beyond the territorial limits of the county, and at the capital of the state, some two hundred miles away. That it should be made in the county is not essential.

A similar question, involving an issue of county bonds in the sum of $100,000 for an exhibit at the Trans-Mississippi exposition held at Omaha in 1898 came before the Nebraska supreme court in that year.[14] Said the court:

[13] Shelby County *v.* Exposition Co., 96 Tenn. 653 (1896).

[14] State *ex rel.* Douglas County *v.* Cornell, 53 Neb. 556 (1898).

In the light of the principles already stated, is the legislation, under which the bonds in question were voted, illegal on the ground that it authorized the imposing of burdens upon the public, by way of taxation, in aid of a private enterprise, and not in furtherance of an object which is public in its character? The answer must be in the negative. The statute under review does not attempt, or purport, to authorize the issuance, or donation, of the bonds to private individuals, or the corporation under whose auspices the exposition is to be held. Nor does the act contemplate that the money derived from the sale of the bonds shall be devoted to promote the interest of a few; but the intention of the law was to enable any county availing itself of its provisions to raise the means with which to meet the expenses of erecting a suitable building or buildings, and maintaining the same, and an exhibit of the resources of the county at the Trans-Mississippi and International Exposition to be held in the city of Omaha in 1898. The proceeds of the bonds are to be disbursed, for the purpose mentioned in the law, by Douglas county, through its officers and agents. We cannot determine judicially that such an object is purely private, and not public in its character.

Although the cases on this subject are not numerous, they are all one way; and there are innumerable instances in which expenditures of this character have been made without contest before the courts. It may be taken as settled, therefore, that the promotion of commerce and industry, through the medium of municipal exhibits at expositions is a legitimate purpose for which public money may be spent.

Financial aid to private enterprises

Many attempts have been made by the cities of this country to further their growth and foster their industrial and commercial prosperity by extending financial aid to private enterprises. Usually these attempts have been in the form of a subscription to the stock or bonds of private corporations or a loaning the credit of the

city, either in money or in municipal bonds. Conceivably such action may be merely an investment of public funds. But needless to say the mere fact that a stock or bond subscription or a loan is sought from a city is fair proof of the speculative character of the enterprise involved; for private capital is notoriously lynx-eyed for prospectively good investments.

Sometimes these attempts to extend financial aid have been in the form of direct donations either of land, municipal bonds, or money. When a city owns lands which have not been acquired for any public purpose and which the city has full power to alienate at will, it may be that there is no legal way by which the city can be prevented from conveying such lands for a private enterprise. This point has probably never been settled; but the fact is that few cities own any lands of this character. Ordinarily a city would have to purchase the land that it sought to donate, and this action would be manifestly equivalent to a donation of money secured by taxation.

Now in spite of the fact that cities have no doubt occasionally given financial assistance of the kind here indicated without any contest having been made before the courts, the law upon this subject is definitely settled by numerous adjudications. In the first place, let it be remarked, the courts have seldom drawn any distinction between a municipal subscription to the stock or bonds of a corporation and an out and out donation.[15] They have apparently recognized that when a city becomes the purchaser of the securities of a private

[15] Such a distinction was applied in Whiting *v.* Sheboygan & Fond du Lac Railroad Co., 25 Wis. 167 (1870).

corporation, the taxing power must be exercised; and the city must be fully prepared to lose the tax funds it has invested. In determining the question of the power of a city it is, of course, impossible to await the ultimate outcome of a private business venture when it might perchance be demonstrated that the exercise of the power of taxation was in fact but a temporary expedient, the funds expended having been returned in the form of dividends or of interest and principal. No court has been more emphatic than the United States Supreme Court in declaring that from the viewpoint of the law it matters not whether the city makes a donation or purchases securities.[16] The actual ownership of property, whether in the form of securities or otherwise, may not be applied as a test to determine the purposes for which a city may levy taxes.

In the second place, the rule has been laid down that a city may be authorized to give financial aid to a private person or corporation only when the business of such person or corporation is public in character. Indeed, the general rule that taxes may be levied only for a public purpose, which we have had more than one occasion to mention, was first laid down in the cases involving municipal aid to railway corporations.[17] As a result of innumerable statutes enacted in all parts of the country during the early period of railway development, a large number of these cases arose, and the rule became firmly established that the railway business was so affected with a public interest that taxes could

[16] Olcott *v.* Supervisors, 16 Wall. 678 (1872).

[17] McBain, *Taxation for a Private Purpose*, in *Political Science Quarterly*, XXIX, p. 185.

be imposed for the purpose of assisting persons or corporations engaged in such business.

The extension of municipal aid to railway corporations was manifestly for the purpose of promoting commerce, however imperfectly this purpose may have been realized in actual results; and the cases which apply the public purpose rule in this connection abound in eloquent discussions concerning the general prosperity of cities in its relation to these arteries of commerce, as well as in discussions of their public character as established by the special privileges conferred and the special obligations imposed upon them. As a public policy, however, the promotion of commerce by this means is largely a matter of historical interest. The policy of giving direct financial assistance to railways has long since given way to the policy of imposing restraints even upon their private financial operations. There remains to be considered, however, the reverse aspect of the rule—namely, that financial aid may not be extended by a city to a person or corporation engaged in private business.

In 1871 the legislature of the state of Maine asked the supreme court whether towns could be authorized by law to assist "by gifts of money or loans of bonds" individuals or corporations engaged in establishing or carrying on manufactures of various kinds. Answering this question in the negative,[18] the court declared:

> Capital naturally gravitates to the best investment. If a particular place or a special kind of manufacture promises large returns, the capitalist will be little likely to hesitate in selecting the place and in

[18] Opinion of Justices, 58 Me. 590 (1871). The question was also asked whether towns could be authorized to go directly into the manufacturing business. *Supra*, 197.

determining upon the manufacture. But whatever is done, whether by the individual or the corporation, it is done with the same hope and expectation with which the farmer plows his fields and sows his grain—the anticipated returns.

Now the individual or corporate manufacturing will in the outset promise to be, and in the result will be, either a judicious and gainful undertaking, or an injudicious and losing one. If the manufacturing be gainful, there seems to be no public purpose to be accomplished by assessing a tax on reluctant citizens and coercing its collection to swell the gains of successful enterprise. If the business be a losing one, it is not readily perceived what public or governmental purpose is attained by taxing those who would have received no share of the profits, to pay for the loss of an unprosperous manufacturer, whether arising from folly, incapacity, or other cause. The tax-payer should not be compelled to pay for the loss when he is denied a share of the profit.

In accordance with the opinion thus given to the legislature, the Maine court held void an act which empowered a town to lend ten thousand dollars to certain persons on condition that they should move their saw-mill and box factory from its existing location in another town.[19] So the United States Supreme Court, in what is perhaps the leading case upon this subject,[20] held void an issue of bonds which had actually been made by a city under a Kansas law empowering any city of the second class "to encourage the establishment of manufactories and such other enterprises as may tend to develop and improve such city, either by direct appropriation from the general fund or by the issuance of bonds." Referring to the railway aid cases, which it was admitted had been

[19] Allen *v.* Inhabitants of Jay, 60 Me. 124 (1872).

[20] Loan Association *v.* Topeka, 20 Wall. 655 (1874); reaffirmed in Parkersburg *v.* Brown, 106 U. S. 487 (1882).

followed by "disastrous consequences," the court pointed to the fact that they had gone no further than to hold that financial assistance might be extended to persons engaged in business of a public character. There was, however, "no difficulty in holding" that the general business of manufacturing was not of this character. "If it be said," the court argued, "that a benefit results to the local public of a town by establishing manufactories, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the town or city."[21] In several other cases, however, the Supreme Court modified this decision to the extent of holding that municipal bonds issued in aid of manufacturing enterprises were valid in the hands of *bona fide* purchasers provided they appeared *upon their face* to have been issued for a municipal purpose.[22]

In a New York case the court of appeals held void an act which empowered a village to subscribe to the stock of a company engaged in the improvement of a private water privilege on the Delaware River for the purpose of manufacturing lumber.[23] The benefit of such a business to the public, said the court, "is remote and

[21] See also Cole *v.* La Grange 113 U. S. 1 (1884).

[22] Hackett *v.* Ottawa, 99 U. S. 86 (1878); Ottawa *v.* National Bank, 105 U. S. 342 (1881); Ottawa *v.* Carey, 108 U. S. 110 (1882).

[23] Weismer *v.* Village of Douglas, 64 N. Y. 91 (1876).

consequential." No public use was authorized to be made of the water power developed by the erection of the dam in the river. There was no greater public use or purpose in this business "than is found in the setting on foot of any business or industry in a community by private parties. Any such enterprise tends indirectly to the benefit of every citizen by the increase of general business activity, the greater facility of obtaining employment, the consequent increase of population, the enhancement in value of real estate and its readier sale, and the multiplication of conveniences. But these are not the direct and immediate public uses and purposes to which money taken by tax may be directed."

So in a Kansas case it was held that a city had not been and could not be empowered to subscribe to the stock of a company organized "for the purpose of carrying on the business of mining gas, coal, oil, salt, and other minerals."[24] Had the business been solely for the purpose of supplying the utility of natural gas, perhaps this action might have been sustained under the doctrine of the railway-aid cases; but "the main purpose of the corporation" appeared to be "to produce minerals for sale on the market for profit." This was a private business venture for which cities were not organized.

Not even where extraordinary calamities fall upon private business within a city may the municipality be authorized to extend financial aid in the form of loans or gifts to strictly private enterprises with a view to reviving trade and commerce. In 1872 a devastating fire swept the city of Boston, causing great loss of property and a partial paralysis of normal industry. The

[24] City of Geneseo *v.* Natural Gas etc. Co., 55 Kan. 358 (1895).

legislature by statute authorized the city to issue bonds to obtain a sum to be loaned to private persons for assistance in rebuilding the burned district. Brought to the bar of the state supreme court, this action was declared void.[25] The court said:

There is no public use or public service declared in the statute now under consideration, and we are of opinion that none can be found in the purposes of its provisions. By its terms the proceeds of the bonds, thereby authorized, are to be expended in loans to persons who are or may become owners of land in Boston, "the buildings upon which were burned by the fire in said Boston on the ninth and tenth days of November," 1872. The ultimate end and object of the expenditure, as indicated by the provisions of the statute itself, is "to insure the speedy rebuilding on said land."

The general result may indeed be thus stated collectively, as a single object of attainment; but the fund raised is intended to be appropriated distributively, by separate loans to numerous individuals, each one of which will be independent of any relation to the others, or to any general purpose, except that of aiding individual enterprise in matters of private business. The property thus created will remain exclusively private property, to be devoted to private uses at the discretion of the owners of the land with no restriction as to the character of the buildings to be erected, or the uses to which they shall be devoted; and with no obligation to render any service or duty to the Commonwealth, or to the city—except to repay the loan—or to the community at large or any part of it. If it be assumed that the private interests of the owners will lead them to re-establish warehouses, shops, manufactories, and stores; and that the trade and business of the place will be enlarged or revived by means of the facilities thus provided; still these are considerations of private interest, and, if expressly declared to be the aim and purpose of the act, they would not constitute a public object, in a legal sense.

As a judicial question the case is not changed by the magnitude of the calamity which has created the emergency; or the extent and

[25] Lowell *v.* City of Boston, 111 Mass. 454 (1873).

importance of the interests to be promoted. These are considerations affecting only the propriety and expediency of the expenditure as a legislative question. If the expenditure is, in its nature, such as will justify taxation under any state of circumstances, it belongs to the Legislature exclusively to determine whether it shall be authorized in the particular case; and however slight the emergency, or limited or unimportant the interests to be promoted thereby, the court has no authority to revise the legislative action.

On the other hand, if its nature is such as not to justify taxation in any and all cases in which the Legislature might see fit to give authority therefor, no stress of circumstances affecting the expediency, importance or general desirableness of the measure, and no concurrence of legislative and municipal action, or preponderance of popular favor in any particular case, will supply the element necessary to bring it within the scope of legislative power.

A similar attempt by the city of Charleston following a ruinous fire in 1866, in which all the buildings in a very large portion of the city were destroyed, was interdicted by the highest court of South Carolina.[26] In this case the fire loan bonds had actually been issued by the city and many of them, without being questioned as to their validity, had passed into the hands of innocent purchasers. Indeed, it was about fourteen years after their issuance that the court declared these bonds void. The opinion recited:

The real object was to loan the credit of the city to private individuals to afford them aid in repairing their losses occasioned by a disastrous fire. It was practically nothing more nor less than lending the credit and funds of the city to private individuals to aid them in building on their own lots dwellings, stores, warehouses, or such other structures as their interest or convenience might prompt, for their own individual use, and to promote their own individual comfort or gain. There was nothing whatever in it of a public nature.

[26] Feldman & Co. *v.* City Council of Charleston, 23 S. C. 57 (1884).

The public were not to have any interest in, or control over, the structures which were thus to be erected by the aid of the public funds, but they were for the sole use, and under the exclusive control, of the individual owners, precisely like any other private property owned by any other private individual residing or owning property in the city.

We cannot conceive how it is possible to invest the manifest purpose of this loan on the part of the city with a public character. It is true that there would be incidental advantages accruing to the city by the increase of its taxable values, and in various other ways that might be suggested, but these are mere incidental advantages which attend any improvements made in a city, even where they are exclusively the work of private individuals, made with their own private funds, and cannot, therefore, have the effect of converting the purpose from a private into a public purpose.

The legislation under review in this case was distinguished from the legislation authorizing aid to railways on the ground that railroads even though privately owned, were "public highways," were granted the power of eminent domain, and as common carriers were required to operate under such regulations as might be prescribed by the government. None of these factors existed to render public in character the business of those whose property had been destroyed by fire.

Of somewhat the same purport was a Kansas decision which held void a law authorizing the issuance of township bonds, following a wide-spread failure of crops in the state, "for the purpose of providing the citizens of such townships with provisions and with grain for seed and feed."[27] In this case the court was at pains to point out that the act could not be sustained as a measure

[27] State *ex rel.* Griffith *v.* Osawkee Township, 14 Kan. 418 (1875).

for the relief of the poor, which was conceded to be "among the unquestioned objects of public duty." But "the obligation of the state" in this regard "is limited to those *unable* to help themselves." In this instance "it is not the helpless and dependent, whose wants are alone sought to be relieved." The act "contemplates a class who have fields to till and stock to care for, and purposes to help them with seed for their fields and grain for their stock, that then they may pursue with better prospects of success their ordinary avocations. It taxes the whole community to assist one class, and that not for the purpose of relieving actual want, but to assist them in their regular occupations." This was further evidenced by the fact that the statute provided that assistance should be extended only through the medium of loans, which loans were to be secured by mortgage notes upon the real and personal property of the borrowers. Surely such borrowers could not be regarded as paupers.

Nor could the act be sustained as a measure to *prevent* pauperism and destitution, although the argument on this score was admitted to be strong. "Let the doorways of taxation be opened," said the court, "not merely to the relief of present and actual distress, but in anticipation of and to guard against future want, and who can declare the result? How certain must be the expectation of want? How nigh its approach? What efforts must the individual make to ward it off? May he do nothing, and demand that the public make provision to guard against the possibility of future suffering? Must wide-spread and general calamity precede the granting of such anticipatory relief, or is it enough

that individual misfortune or indolence render probable the approach of want?" The mere mention of these questions, the court thought, was sufficient to suggest "the dangers which would follow the adoption of this as a rule of public conduct."

To many minds it may appear that the extension of financial assistance to private industry by the government of a city in time of serious calamity has in point of fact quite as large elements of public purpose as has the lending or giving of government aid to a railway or other utility corporation. The risk of public funds is certainly no greater in the one case than in the other. Our national government has in times past practically given away large portions of the public domain to encourage settlement and thereby to foster individual economy; and there is surely no large difference between taxation itself and the alienation of a public economic value that might some day produce revenue in lieu of taxation. We have given ship subsidies for the upbuilding of a merchant marine; and while as a policy these subsidies have been widely debated, few have been heard to contend that they were illegal on the ground of their being for a non-public purpose. The recent rural credits law carried with it an appropriation of national funds for the establishment of banks to make loans to farmers; and while these banks may become self-sustaining, the funds so appropriated may, on the contrary, be lost. The rule that taxes may not be imposed for a private purpose has probably never been applied to an act of Congress. Apparently, however, it is a general rule of our constitutional law; as such it is just as appropriately applicable to a law of

Congress as to the action of a city taken under due authorization from the state.[28]

But in the case of cities the courts have, so far as their adjudications go, elected to assert that the financial aid of the government may be extended only to those businesses that are included within the commonly accepted meaning of the term public utility.[29] Perhaps in the long run, when the sometime prodigality and recklessness of our quickly changing municipal administrations are considered, the restrictive hand of the courts in this respect may be regarded as unqualifiedly beneficent. It might have been even more beneficent if the opening of public fiscs to the railways had also been prevented at the period when that practice was in vogue. From the viewpoint of the general public welfare, however, it is not easy to see that the building of a railway is of greater public benefit than the rebuilding of a fire-ruined city or the rehabilitation of a farming community struggling out of a wide-spread failure of crops. That a railway must be granted the power of eminent domain may be an argument in support of the authority of the government to regulate; but, being in itself a special public grant, this power is certainly a small argument in support of authority to make an additional public grant—a grant of public funds. That the power to regulate the railway justifies this additional grant may seem plausible; but the fact is that railways

[28] The courts have in fact never referred this rule to any specific provision of a state or the national constitution. McBain, *Taxation for a Private Purpose*, in *Political Science Quarterly*, XXIX, p. 185.

[29] Logically, if called upon, the United States Supreme Court would be compelled to sanction a municipal donation to the owners of grain elevators (*supra*, 186); the Maine court, to the operators of fuel yards (*supra*, 196); and the Georgia court, to manufacturers of ice (*supra*, 199).

were given public aid at a time when they were subjected to an almost absurd minimum of public regulation. In the development of governmental regulation of railways in the United States the gifts of the government to them or the purchase of their securities by the government has exerted an entirely negligible influence.

It has already been pointed out as open to grave question whether in its historical aspect the power of the government to regulate business can properly be ascribed to the modern distinction between public and private business.[30] If this distinction could be discarded so far as the power of regulation is concerned, there would be destroyed the only prop upon which has been rested the competence of the government to lend financial aid to private persons and corporations. In view of the profits to private capital that have accrued from public utility enterprises it is no longer conceivable that cities would, except perhaps in some unusual circumstance, come forward with direct financial assistance. Moreover, except in small communities or in time of public calamity, cities have abandoned the notion of erecting their industrial and commercial prosperity upon the uncertain foundation of direct financial aid to private enterprise. Whether this idea may for one reason or another be revived at some future time, remains to be seen. For the present both the law, as it has been expounded, and the practice, as it has evolved, stand inexorably in the way.

[30] *Supra*, 179.

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